THE NORTHERN IRELAND LAW REPORTS

1940

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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY
M. G. ELLISON,
ONE OF HIS MAJESTY'S COUNSEL.

1940

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Lord Chief Justice:

THE RIGHT HON. JAMES ANDREWS.

Lords Justices of Appeal:

THE RIGHT HON. ANTHONY BRUTUS BABINGTON,
THE RIGHT HON. EDWARD SULLIVAN MURPHY.

Chancery Division:

THE HON. ROBERT DICK MEGAW.

King's Bench Division:

THE RIGHT HON. THOMAS WATTERS BROWN.

Judicial Commissioner Land Purchase Commission

THE HON. ROBERT DICK MEGAW.

Attorney General:

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

THE ARMAGH COUNTY INFIRMARY COMMITTEE v. THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1).

K.B.D 1939.

April 19.
May 4.

Valuation Acts—Exemption—Hereditaments used exclusively for charitable purposes—House owned by County Infirmary Committee and in actual occupation of their part-time surgeon—Valuation (Ireland) Amendment Act, 1854 (17 *Vict., c.* 8), *section* 2—*Valuation (Ireland) Act*, 1852 (15 *&* 16 *Vict., c.* 63), *section* 16—"*Private Profit or use.*"

In 1937 the A. County Infirmary Committee built a house as a residence for their part-time surgeon. This house included an out-office and garden. It was owned by the County Infirmary Committee but was in the actual occupation of their part-time surgeon.

It was built within the curtilage of the Infirmary and was connected with the main infirmary buildings for patients by an enclosed communicating passage.

The County Court Judge of A. held that this house should be listinguished by the commissioner as exempt from poor rates and county rates as being "used for charitable purposes."

He, accordingly, allowed the appeal from the Commissioner of Valuation but stated a case for the opinion of the King's Bench Division.

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

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Held, by the King's Bench Division (Andrews, L.C.J., and Brown, J.) that the County Court Judge was right in holding that the house occupied as a residence by the part-time surgeon should be distinguished as exempt as being "used for charitable purposes."

CASE STATED by the County Court Judge and Chairman of Quarter Sessions for County Armagh, pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, on the application of the Commissioner of Valuation for Northern Ireland.

The material facts as appearing from the case were as follows :—

This appeal relates to the entry made in the Valuation Lists by the Commissioner in the course of the annual revision for the valuation of tenements and hereditaments held under the Valuation Acts for the rating year 1938-39 in respect of the house, out-office and garden situate at Abbey Street, Armagh, owned by the appellants and occupied by Doctor H. C. C. Deane, F.R.C.S.I.

In their notice of appeal the appellants set forth their grounds of appeal as follows :—

"(1) That the valuation is excessive and ought to be reduced.

"(2) That the hereditament should be distinguished "in the Valuation List as 'exempt,' being "part of a hereditament of the description "coming within the terms of the second "proviso to section 63 of the Poor Relief "Ireland Act, 1838."

The County Court Judge fixed the valuation of the hereditament at £63 and no question arises in this case as to the amount of the valuation.

The appeal was heard at Armagh Quarter Sessions on the 17th day of October, 1938.

Evidence was given on behalf of the appellants by Doctor Deane and by Major Boyle, an estate agent and valuer, and on behalf of the Commissioner by Mr. T. C. Glenn, valuer. The facts as proved or admitted are as follows :—

The hereditament consists of a three storied dwelling house built in 1937 within the curtilage of

the Infirmary but separate and distinct therefrom except for an enclosed communicating passage which forms a bridge connecting the two buildings; there is a garage and other out-offices and a garden forming part of the hereditament. There is a separate gate and drive leading to the dwelling-house from Abbey Street. The dwelling-house is built on land the property of the appellants and held under one title with the main building. The main building together with nurses' home adjoining is distinguished as "exempt" in the Valuation List.

Doctor Deane was appointed surgeon to the Infirmary on a part-time basis some fourteen years ago and prior to the building of the hereditament in question in this case he lived in the main building of the Infirmary having his own apartments therein. The said apartments were provided by the appellants free of charge to Doctor Deane as part of the terms of his employment. The Infirmary, including the said apartments, was distinguished as "exempt" in the Valuation List.

The hereditament in question in this case was built by the appellants at a cost of £3,800 for the purpose of a dwelling-house for the surgeon to the Infirmary, and Doctor Deane is required as a term of his employment to reside therein. He does not pay any rent therefor and the repairs are done and outgoings are paid by the appellants. The house was furnished by Doctor Deane.

Doctor Deane has a private practice which he carries on from the said hereditament. He is Medical Officer in charge of the troops at the Armagh Depot, is Medical Officer for His Majesty's Gaol, Armagh, and is Medical Officer for the Macan Asylum for the Blind, Armagh. He is also Medical Officer to Armagh Royal School and holds other minor medical posts in the County of Armagh. He does not see patients in the house, but arrangements are made with private patients over the telephone therein. The study is used by Doctor Deane for dealing with books and documents relating to his private practice and also with correspondence relating to his work in the Infirmary.

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In addition to Doctor Deane there is a House Surgeon employed by the appellants who resides in apartments in the main building of the Infirmary. The House Surgeon usually holds his appointment for one year and while so engaged he gives his full time to the service of the Infirmary.

In cross-examination Doctor Deane admitted that about fifty per cent. of the hospitals of this type in Northern Ireland had not a medical superintendent residing on the premises.

No part of the dwelling-house is otherwise used for the work of the Infirmary and Doctor Deane maintains so far as possible the seclusion and privacy of the house as a private dwelling-house.

For the appellant it was contended that the hereditament was part of the Infirmary. That it was necessary for the surgeon to occupy the hereditament for the efficient working of the Infirmary. That he was required to reside therein by the terms of his appointment. That accordingly the hereditament should be distinguished in the Valuation List as " exempt " within the terms of the second proviso to section 63 of the Poor Relief Ireland Act, 1838.

For the Commissioner it was contended that the hereditament was a separate and self-contained unit. That it should not be distinguished in the Valuation List as " exempt " unless it be established that it is used exclusively for charitable purposes. That in fact the hereditament was not used, nor exclusively used, for charitable purposes, being used as it was mainly as a private dwelling-house and being also used for purposes connected with Doctor Deane's private practice as well as for purposes connected with his work for the Infirmary. That Doctor Deane derived personal benefit, profit or use from the hereditament. That it might be convenient for the purposes of the Infirmary to have its surgeon residing in the hereditament but that it was not necessary or essential.

The County Court Judge was of opinion having regard to the decision of Palles, C.B., in *Moore v. Boyd*, 1911, 2 I.R., page 579, following the decision

in *Commissioner of Valuation v. Sligo Harbour Commissioners*, 1899, 2 I.R., page 214, that the words used in section 2 of the Valuation Act, 1854, had the same meaning as the words in section 63 of the Poor Law Act, 1 & 2 Vic., c. 56.

He was further of opinion after reading the decision in *Mulholland's case* (unreported) that the real question in this case turned not upon the nature or user of the house occupied by Doctor Deane as surgeon to the Infirmary but upon his status as occupier. That is to say, as to whether he was a tenant of the hereditament or whether he occupied it " by virtue of the duties or services imposed upon " him with a view to the more efficient performance " of those duties or services ? "

Having regard to the decisions in *Mulholland's case* and in the case of *Dobson v. Jones* (5 Man. & G. 112) (the facts of which latter case the County Court Judge could not distinguish from the facts in the present case) and to the dictum of Brett, C.J., in *Fox v. Dalby*, L.R. 10 C.P., at page 295, the County Court Judge was of opinion that, no matter what Doctor Deane's other activities or employments were, residence in the house appropriated to the surgeon to the Infirmary was in the words of Andrews, L.J., in *Mulholland's case* (unreported), part of the services he was " paid to perform " and accordingly that his occupation was not that of a tenant.

Upon these ground the County Court Judge held that the hereditament should be distinguished in the Valuation List as " exempt " and allowed the appeal. He referred to his order made on the 27th day of January, 1939.

The question for the Court is :—Was the County Court Judge right in law in so holding having regard to the facts and findings above set forth ?

Warnock, K.C., and *Curran* for the Commissioner of Valuation :—

Section 63 of the Poor Relief Ireland Act, 1838, provides that no building used exclusively for charit-

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able purposes shall be rateable, except where any private profit or use shall be directly derived therefrom.

We rely on the two grounds (*a*) that this house is not "used exclusively for charitable purposes," and (*b*) that a private profit or use is derived therefrom. The user of the premises must be considered.

Section 2 of the Valuation (Ireland) Act, 1854, must be read into the Valuation (Ireland) Act, 1852, in place of section 15 of that Act, and section 12 of the 1852 Act sets out the hereditaments which are rateable.

We rely very strongly on the provisions which require exclusive user for charitable purposes.

From the facts set out in the case stated it cannot be be said that in the present case there exists exclusive user for charitable purposes.

We submit that the paragraph in the case stated to the effect that in the opinion of the County Court Judge after reading the decision in *Mulholland's case* (1), that the real question in the present case turned not upon the nature or user of the house occupied by Doctor Deane as surgeon to the Infirmary but upon his status as occupier, is not in accordance with the Act of Parliament.

The judgment of Palles, C.B., in *The Commissioner of Valuation v. O'Connell* (2) is very important, as it shows the real principle involved. In that case Palles, C.B., was dealing with a full time officer. There is no case either in England or Ireland resembling the present case. The basis of the Chief Baron's dicta is quite clear, and the present case is quite different. The resident surgeon was getting a private profit or use out of the premises. In such a case the premises are not to be distinguished as exempt.

In his judgment in *The Commissioner of Valuation v. O'Connell* (2), Palles, C.B., said that the circumstance that a valid charitable trust was imposed upon the premises was not alone sufficient to exempt them from taxation. "To be so exempt, they must be 'used,' and 'used exclusively,' for charitable purposes: (15 & 16 Vict., c. 63, s. 16). Any use of such premises by a person who is not an object of the

(1) Unreported. (2) [1906] 2 I.R. 479, 485.

charity is, to my mind, 'a private profit or use . . . "directly derived therefrom' within 1 & 2 Vict., c. 56, s. 63, and such a profit or use, if it exists, prevents the premises being used '*exclusively*' for charitable purposes. Thus the question is, 'Is the occupation of the premises by the Very Rev. respondent, because "he is parish priest, 'a private profit or use,' or in "other words, is he, in his character as parish priest, "an object of the charity?'"

In *McKenna v. Commissioner of Valuation* (1), Madden, J., said in his judgment: "I quite agree that "where a building is dedicated exclusively to a "charitable purpose, such as a school or an hospital, "the circumstance that necessarily or fairly some "teachers required for the school have their residence "in the premises, does not change the character of "the institution and convert a building dedicated "exclusively to a charitable purpose into a mere "residence."

Later on in his judgment in that case, Madden, J., referring to the case of *The Commissioner of Valuation v. O'Connell* (2), said: "That case was decided upon "the general principle that if premises are used "substantially as a residence they are liable to assess-"ment, although the persons residing in the building "use it for the discharge of charitable duties."

The real principle applicable is to be found in these dicta.

Mulholland's case (3) is clearly distinguishable from the present case where Doctor Deane was not occupying the house merely as a servant.

The dictum which has been relied on in the judgment of Andrews, L.C.J., in *Mulholland's case* (3) as to the status in which the premises were occupied does not cover the present case.

[They also referred to *Dublin Cemeteries Committee v. The Commissioner of Valuation* (4).]

J. D. Chambers, K.C., and *Miller* for the Armagh County Infirmary Committee:—

(1) 49 I.L.T.R. 103, 104.
(2) [1906] 2 I.R. 479.
(3) Unreported.
(4) [1897] 2 I.R. 157.

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The Commissioner of Valuation has determined that this is a separate hereditament.

As appears from the decision in *Switzer & Co. v. The Commissioner of Valuation* (1), the unit of valuation is each separate rateable hereditament. In that case, Palles, C.B., said : " In my opinion the unit of valuation " of premises in the occupation of tenants is such " hereditaments, of the description in section 12 of the " Act of 1852, as are in the occupation of the same " occupier, holding from the same immediate lessor, " under the same lease or contract of tenancy." The Chief Baron concluded his reference to this question by saying : " In other words, in my opinion the char- " acteristic of a tenement to be separately valued, " is a tenement, all of which is in the occupation of " the same occupier, under the same immediate lessor, " under one contract of tenancy."

In the present case the whole property, including the infirmary, nurses' home, and doctor's residence is in the occupation of the same occupier, under the same immediate lessor, under one contract of tenancy. We say that that occupier is the County Infirmary Committee. The question of occupation is involved in the present case.

The law is stated in these words in *Ryde on Rating* (sixth edition), page 33 : " There must be actual " possession to constitute occupation, it does not " follow that the " person in visible actual possession " is the rateable occupier ; for if he be a servant, or " agent, in possession on behalf of his master or " employer, the occupation is the occupation of the " master or employer."

In *The King v. Tynemouth* (2), it was held that the tolls of a lighthouse situated in the township of Tynemouth, which tolls were collected out of the township, in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable *quâ* tolls in the township, and that the residence in such lighthouse by one as servant to the owner, at an annual salary, to take care of the light, is the occupation of

(1) [1902] 2 I.R. 275, 281, 282. (2) 12 East. 46.

the master, who alone can be rated in respect of such occupation of the toll-house.

In *Dobson v. Jones* (1), the surgeon of Greenwich Hospital occupied as such a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the commissioners of the hospital, no officer of the hospital was allowed to make any exchange of apartments. It was held that the surgeon did not occupy the house "as tenant," inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon.

That case is very like the present case.

In the present case an efficient hospital is required and money was spent to secure the services of an efficient surgeon who should be on the spot.

The real test is what is the main user of the premises, who is in physical occupation of the premises and why is he there? The primary user is the user by the county infirmary committee, the advantage of the surgeon's getting a free house is only ancillary. The user of the premises is user by the county infirmary committee, the surgeon is in the house as their officer. The test is, is it essential that he should live there to carry on his duties? The fact that it is essential distinguishes the present case from *The Commissioner of Valuation v. O'Connell* (2).

This institution consists of three parts, the hospital, the nurses' home and the surgeon's residence. All three parts are essential to the carrying on of the institution. The governors require that the surgeon shall reside in certain premises. The surgeon's residence is a part of the institution. That house is an essential part of the charity. It matters not whether the surgeon was a whole-time or a part-time officer. His occupation of the house is exclusively and solely referable to his connection with the charity. He has no right to occupy that house in connection with any

(1) 5 Man. & G. 112. (2) [1906] 2 I.R. 479.

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other institution. Every argument that applies to this house also applied to that part of the infirmary formerly occupied by Doctor Deane.

If he is there as a servant, the occupation is that of the master.

In *Churchwardens of St. Anne v. Linnean Society* (1), the librarian and porter, whose attendance in the house was necessary for the purposes of the institution, occupied rooms in the part of the house retained by the Society, and in consideration thereof, received less salary. It was held that the occupation by the librarian and porter was clearly an occupation by the society for the purposes of the institution.

In the present case the surgeon gets no profit or benefit from residing in this house. He does not derive his external offices from his occupation. If it were not for the charity he would never have occupied the house. One cannot assume that he would live there if he were not obliged.

Curran (in reply):—

We submit that Doctor Deane receives "a private "profit or use" from his occupation of this house. This house was a benefit to him in carrying on his practice. He was able to make use of the telephone and study, in carrying on his general practice. It is necessary to look at the particular facts and the particular user of the premises.

We rely on the words used by Palles, C.B., in *Commissioner of Valuation v. O'Connell* (2), where he said: "Any use of such premises by a person who is "not an object of the charity is, to my mind, 'a private "'profit or use . . . directly derived therefrom' "within 1 & 2 Vict., c. 56, s. 63, and such a profit or "use, if it exists, prevents the premises being used "'*exclusively*' for charitable purposes."

In *Clancy v. Commissioner of Valuation* (3), Palles, C.B., said in his judgment: "If the actual user is not "exclusively charitable, then the premises are rateable."

Cur. adv. vult.

(1) 3 E & B. 793.
(2) [1906] 2 I.R. 479, 485.
(3) [1911] 2 I.R. 173, 184.

ANDREWS, L.C.J., delivered the judgment of the Court as follows :—

This case stated relates to the house, out-office, and garden, situate at Abbey Street, Armagh, owned by the Infirmary Committee and in the actual occupation of their part-time surgeon, Doctor Deane. It was built in 1937 within the curtilage of the Infirmary, and is connected with the main Infirmary building for patients by an enclosed communicating passage. The buildings also include a Nurses' Home, which, together with the main Infirmary building, is distinguished as "exempt" in the Valuation List. The question which we have to determine is whether the County Court Judge was right in holding that the house so occupied by Doctor Deane is entitled to the like exemption.

Doctor Deane was appointed to his present position some fourteen years ago, and prior to the erection of the house in question in this case he lived in the main building of the Infirmary where he had his own apartments provided by the Committee free of charge as part of the terms of his employment. Such apartments were likewise distinguished as exempt. All the premises are held under a common title.

Doctor Deane is required as a term of his employment to reside in the house which has been provided for him. He occupies it rent free, and all repairs are executed and outgoings paid by the Infirmary Committee. As a part-time officer Doctor Deane is permitted to carry on a private practice. He does not, however, see patients in the house, but makes arrangements with them over the telephone therein, and also uses the study for dealing with books and documents relating to his private practice as well as to his Infirmary work.

The question to be determined arises under section 2 of the Valuation (Ireland) Act, 1854. Should the house be distinguished by the Commissioner in his lists as "used for charitable purposes?" By that section, if so distinguished, the house, as long as it shall continue to be used for such purposes, shall be deemed exempt from poor rates and county rates.

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This section must be read in conjunction with section 16 of the Valuation (Ireland) Act, 1852, by which, so far as is relevant, it is provided that no hereditaments or portions of same shall be deemed to be used for charitable purposes unless they shall be used *exclusively* for such charitable purposes; and the judgment of Palles, C.B., in *Commissioner of Valuation v. O'Connell* (1), clearly establishes that "a private profit or use . . . directly derived" from the hereditaments within section 63 of the Poor Relief (Ireland) Act, 1838, prevents the premises being used "exclusively" for charitable purposes.

O'Connell's case (1) was strongly relied upon by both parties in their arguments before this Court and it must be carefully examined. For the Commissioner of Valuation, reliance was placed on the decision of the Court that a house built by parishioners for and used by a Roman Catholic parish priest as a residence and for parochial purposes is not exclusively used for charitable purposes so as to be exempt from assessment for poor rate. The house was built as a residence for the parish priest for the time being with money largely provided by public subscription on a site selected by the parishioners. It had six rooms, one of which was used solely as a private chapel for the occupants of the house, and another of which was used for keeping all parish registers and books. No person had a right to reside in the house except the parish priest and his servants or visitors. The judgment of the Court consisting of Lord O'Brien, L.C.J., Palles, C.B., and Gibson, J., was delivered by Palles C.B. The existence of a valid charitable trust, namely—the advancement of religion—created by the lease under which the premises were held was not disputed, for the trust provided a benefit not to the clergyman as such but to the Roman Catholic parishioners of the parish to whom his ministrations were a benefit. But, in addition to this, it provided a private residence for the priest who had the beneficial occupation of the premises, and he was not an object of the charity. Any such use by a person not an object of the charity

(1) [1906] 2 I.R. 479, 485.

was, in the opinion of the Court, "a private profit or use . . . directly derived therefrom" within section 63 of the Poor Relief Act, 1838, which prevented the premises being used "exclusively" for charitable purposes On this ground the premises were held not exempt.

Counsel for the Armagh Infirmary Committee, however, strongly relied upon a passage in the judgment of the Lord Chief Baron, in which he said:—

"I desire to be distinctly understood as not "deciding that if the main purpose for which a "building is used is a charitable one, as is that of an "hospital for the gratuitous healing of the poor, the "residence therein, as part of their duty, of nurses "or a resident physician would necessarily render "the use not 'exclusively for charitable purposes.' "I should be prepared to hold quite the contrary. "But in the present case, in my opinion, this house "was provided for the benefit and convenience of "the parish priest, and not as imposing upon him the "personal *obligation* of residence there which medical "gentlemen and nurses may be subjected to."

The words of Madden, J., in *McKenna v. Commissioner of Valuation* (1), are to the like effect. "I quite agree," he says, "that where a building is "dedicated exclusively to a charitable purpose, such "as a school or an hospital, the circumstance that "necessarily or fairly some teachers required for the "school have their residence in the premises, does not "change the character of the institution and convert "a building dedicated exclusively to a charitable "purpose into a mere residence. The same principle "applies in the case of an hospital. We all know that "in an hospital there is a resident surgeon, a resident "physician; that nurses and other employees have "their residence in the hospital, but it does not on that "account cease to be an hospital dedicated to a "charitable purpose."

These passages seem to me to be directly in point in the present case. The house occupied by Doctor Deane stands within the curtilage of the Infirmary

(1) 49 I.L.T.R. 103.

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whose "main purpose" is purely charitable. He occupies it "as part of his duty," or, in other words, he was "subjected to the personal obligation of "residence there." Clearly if he were a whole-time resident physician, residing, as he formerly did, in rooms set apart in the main Infirmary building for his exclusive use, such rooms would be exempt. Should this house be held not exempt because either (*a*) it is physically a separate building from the main Infirmary building though within the same curtilage and connected with it by a communicating passage; or (*b*) Doctor Deane is only a part-time, not a whole-time, medical officer. I shall consider these points separately.

As to (*a*)—Neither principle nor common sense would in my opinion justify any such distinction. I could understand such an argument if the house had been built on land newly acquired by the Committee at some distance from the Infirmary premises; but this house was built by the body who manage and control the charity on lands which have long been impressed with a valid charitable trust, and in the circumstances of this case it seems to me to be as much part of the charity as if it were part of the main building or were erected wholly contiguous to it.

As to (*b*)—My first observation is that the Lord Chief Baron in the passage which I have cited does not qualify his reference to a "resident physician" with the word "whole-time." The important matter to his mind was that the physician's residence in the house should be "as part of his duty"; that the house was not provided for his benefit and convenience, but because there was imposed on him the personal *obligation* of residence there which medical gentlemen may be subjected to. That precisely is the position of Doctor Deane.

But then it is argued that Doctor Deane makes a private profit or use out of the house because he carries on his private practice *from* it. It must be noted that the word in the case stated is "from" not "in." As already mentioned it is found as a fact that the Doctor does not see patients in the house;

and there is no finding in the case stated that the limited user for other than Infirmary purposes amounts to a "private profit or use." In the absence of such a finding I am certainly not prepared to assume that it amounts to a "private profit." Before a profit is ascertained to exist both sides of the account must be examined; and if that were done in the present case the alleged profit would probably wholly disappear, being more than balanced by the loss sustained by the Doctor in his private practice owing to the situation of his residence and his inability to see private patients there. Must we then hold, in the absence of any finding, that there is a "private use" of the house by Doctor Deane? In my opinion we are under no such compulsion. He does not occupy it as his own private property. He occupies it free of rent and all other outgoings under the term of his employment for a public purpose in the discharge of a public duty by reason of the public appointment which he holds. Is it then to be said that because, when so occupying it, he uses it in the restricted manner referred to, this necessarily amounts to a private use which rules out exclusive user for charitable purposes? I am not prepared so to hold. Inviting a friend to dinner would in one sense be a private user of the house; but could it be contended that if Doctor Deane were a whole-time officer such a private user would render premises which were otherwise exempt liable for rates? In my opinion such a restricted private user as is referred to in the present case is not such as to prevent the premises being properly held to be "used exclusively for "charitable purposes."

It is fairly clear that the Lord Chief Baron was prepared to disregard a user by persons not within the charity if such user was "insignificant or unsub-"stantial" *Clancy v. Commissioner of Valuation* (1), and the application to cases of this kind, of the doctrine *de minimis non curat lex* was recognised by this Court in *Commissioners of Valuation v. Fisherwick Church Trustees* (2). (See Judgment of Brown, J., at p. 82).

Before concluding this judgment it is perhaps right

(1) [1911] 2 I.R. 173, 184. (2) [1927] N.I. 76, 82.

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that I should refer to the decision of this Court in *Mulholland v. Commissioner of Valuation for Northern Ireland* (1), to which the learned County Court Judge makes reference in the case stated. I wish to state very clearly that nothing that I said in that case was intended to substitute "the status as occupier" for "the user of the premises" as the real question to be determined. No issue can be put by the Court in the place of that expressed in the Statute; but in determining this question as to whether a house is used for charitable purposes or otherwise, the character of the occupation is, as it seemed to the Court, a matter of vital importance. If the occupation of the sexton, school teacher, or resident physician, as the case may be, be a part of the services which he is required to perform and for which he is paid, then such occupation is in reality that of a servant on behalf of his master—not that of a tenant. This, I said and I now repeat, is a "necessary element" towards exemption, which was wholly absent in *Mulholland's case* (1), but is found to exist in the present case. As "an element," however, it never was intended to eliminate other elements or relevant matters from consideration in arriving at a determination as to the true character of the user.

For these reasons we answer the question submitted to us in the affirmative, and declare the Infirmary Committee entitled to their costs of the case stated which we measure at Twenty guineas.

Solicitors for the Armagh County Infirmary Committee: *Crozier & Emerson.*

Solicitor for The Commissioner of Valuation for Northern Ireland: *F. C. MacNeice.*

J. McC.

(1) Unreported.

GEELAN v. SMITH (1).

K.B.D. 1939.

May 4.

Merchandise Marks—Sale of goods imported from Eire—Indication of origin—Whether term "Irish" sufficient indication of origin—Merchandise Marks Act, 1926 (16 & 17 *Geo.* 5, *c.* 53), *section* 1 (1), 10 (1).

The defendant, who carried on business as a dairyman and packer of butter at Cregagh Dairy, Loopland Drive, Belfast, sold butter which had been produced in Eire, and which was wrapped in a parchment wrapper bearing the words, "Irish Creamery Butter "Freshly Packed by Cregagh Dairy, Loopland Drive, Belfast," and was contained in a cardboard carton bearing on one side the words, "Pure Irish Creamery Butter Freshly Packed," on a second side the words "Pure Irish Creamery Butter, Cregagh Dairy, "Loopland Drive, Belfast," and on a third side a picture of a dairy farm with cattle grazing thereon, and the words "Cregagh" and "Dairy."

Held, by the King's Bench Division (Andrews, L.C.J., and Brown, J.), that the term "Irish" was not a sufficient indication of origin under the Merchandise Marks Act, 1926, section 1, sub-section 1 and section 10, sub-section (1).

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by the Resident Magistrate sitting at Belfast Petty Sessions, on 20th February, 1939.

The material facts are stated in the judgment of the Lord Chief Justice.

Arthur Black, *A.-G.*, and *J. Gerald Dougherty*, for the complainant :—

There was nothing on the wrapper or carton to show that the butter was imported from Eire.

The intention of the Act was not carried out by this wrapper, for it is not shown that the goods are imported. There is no definite indication of origin within the meaning of the Merchandise Marks Act, 1926.

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

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The net point is whether the word "country" in the Act means a country in its economic or political sense, or in its geographical sense.

In the preamble to the Eire (Confirmation of Agreements) Act, 1938, the United Kingdom and Eire are referred to as "countries." Section 1 of that Act defines the territory of Eire. The First Schedule to that Act also refers to the United Kingdom and Eire as "the two countries." Article 14 also uses the word "country" when referring to the United Kingdom and Eire.

In *The King (Moore) v. Newtownstewart Model Dairy, Ltd.* (1), it was argued by the defendants that the use of the word "Empire" on the label was a sufficient compliance with section 10 of the Merchandise Marks Act, 1926, but it was held that it was not a compliance with the section. Brown, J., said in his judgment, "The intention of the section was that the indication of origin should be clear and conspicuous." We say that the indication of origin should be also unambiguous.

Lowry, K.C., and *Sheil*, for the defendant :—

The King (Moore) v. Newtownstewart Model Dairy, Ltd. (1), shows that the whole object of the Merchandise Marks Act, 1926, was to prevent deception ; unless the defendant was attempting to deceive he has committed no offence. The intention of this Act was to prevent goods being "palmed off" on the consumer. The description "Pure Irish Creamery Butter" is a sufficient designation of the country of origin.

The territory outside Northern Ireland is still a part of Ireland. Eire and Northern Ireland together constitute Ireland.

The real test is whether there is an intention to deceive. In the markets of Great Britain butter such as this is described as Irish Creamery Butter.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : We do not require to hear the Attorney-General in reply in this case, as in our opinion

(1) [1938] N.I. 94, 101.

there is no doubt as to the answer which we should give to the question submitted to us.

The summons brought against the defendant charged that on the 19th of January last, at Belfast, the defendant sold imported goods, to wit, imported butter, to which had been applied the name of a place in the United Kingdom, to wit, Belfast, without such name being accompanied by an indication of origin, contrary to the provisions of the Merchandise Marks Act, 1926.

The facts of the case are simple. It is admitted that the butter so sold by the defendant was produced in County Sligo, Eire. It was contained in a parchment wrapper on which was printed the words "Irish "Creamery Butter, freshly packed by Cregagh Dairy, Loopland Drive, Belfast." When so wrapped it was placed in a cardboard carton which contained on one side the like description of pure Irish Creamery Butter freshly packed; on a second side were the words "Pure Irish Creamery Butter, Cregagh Dairy, Loopland Drive, Belfast"; whilst on a third side there was a picture of a dairy farm with cattle grazing thereon, and the words "Cregagh" and "Dairy" on the left and right margins thereof, respectively. This picture of a dairy farm and the words "Cregagh Dairy" would reasonably suggest to the mind of any purchaser that the butter contained in the carton was produced in that dairy. Neither wrapper nor carton contained any words indicating that the butter had been imported, or that it had not been produced in Northern Ireland.

Section 1 (1) of the Merchandise Marks Act of 1926 provides, as far as is material, that it shall not be lawful to sell . . . in the United Kingdom any imported goods to which there is applied any name . . . being or purporting to be the name . . . of any manufacturer, dealer or trader or the name of any place or district in the United Kingdom unless the name . . . is accompanied by an indication of origin.

By section 5, sub-section (1), it is provided that if any person sells . . . any goods in contravention of the provisions of the Act he shall be guilty of an offence against the principal Act (i.e., the Merchandise Marks Act, 1887).

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The term "indication of origin" occurring in section 1, sub-section (1), is defined in section 10 (1) as meaning, at the option of the person applying the indication, either :—

(*a*) in the case of goods manufactured or produced in any foreign country, the word "foreign," and in the case of goods manufactured or produced in a part of His Majesty's dominions outside the United Kingdom, the word "Empire" ; or

(*b*) a definite indication of the country in which the goods were manufactured or produced ;

the indication being given in either case conspicuously.

Section 10 (1) further defined the term "United Kingdom" as meaning Great Britain and Northern Ireland.

No reliance could be placed in the present case upon sub-section (*a*) of section 10 (1) above referred to, as the word "Empire" did not appear on either wrapper or carton ; but counsel for the defendant argued that the use of the word "Irish" on both wrapper and carton satisfied the requirements of sub-section (*b*).

In considering this argument it is necessary to determine what is meant by the word "country" in this sub-section. In my opinion for the purposes of the present case the unit referred to is necessarily what has been called a political or economic unit as distinguished from a geographical unit, and any area outside the United Kingdom such as the Irish Free State, now called Eire, is properly referred to as a "country," which ought to be definitely designated if the provisions of the Act are to be duly complied with. The United Kingdom of Great Britain and Northern Ireland, His Majesty's Dominions, and foreign countries constitute three distinct classifications or categories under the Act. This conclusion is, in my opinion, further evidenced by the provisions of the Eire Confirmation of Agreements Act, 1938, to which the Attorney-General referred in his argument. In the preamble and in the First Schedule to the Act which contains the provisions of the Agreement which had been arrived at between the Government of the United

Kingdom and the Government of Eire both the United Kingdom and Eire are referred to as "countries." So also section 3 (4) of the Act refers to importation from Eire or exportation from Eire "to any other "country." This Act, passed by the Imperial Parliament, may fairly and properly be relied upon as an indication of what not only the authorised representatives of both the United Kingdom and Eire but also the Legislature regarded as separate countries.

In these circumstances I am clearly of opinion that the sale of the butter referred to in the Case Stated was unlawful by reason of the name of the Cregagh Dairy not being accompanied by any definite indication of the country in which the butter was manufactured or produced, or without it even being indicated that the butter had been imported into the United Kingdom.

In conclusion I would make brief reference to *The King* (*Moore*) *v. Newtownstewart Model Dairy, Ltd.* (1). In that case reliance was placed by the defendant upon the use of the word "Empire" as satisfying the requirements of section 10 (1) (*a*), but it was held by the Court that the provisions of the section were not complied with as the word only appeared in what was purely an advertising sentence, and that it was both inconspicuous and evasive. No reliance was placed, or on the facts could have been placed, upon section 10 (1) (*b*), but I may say that I entirely agree with the words of Mr. Justice Brown who, in giving judgment in the case, stated that the intention of the section was that the indication of origin should be clear and conspicuous. That view in my opinion is fully justified by the use of the words "definite" and "conspicuously" in the section.

For the reasons stated I am of opinion that an offence was committed by the defendant, and that the case must be referred back to the Resident Magistrate with a direction that he should proceed according to law.

We allow the complainant his costs of the Case Stated measured at £15 15*s.* 0*d.*

BROWN, J. : I agree with the judgment of the Lord Chief Justice. The indication of origin required is

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(1) [1938] N.I. 94.

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not clear, this butter was produced outside the United Kingdom and the country of origin should be clearly and conspicuously indicated.

Butter described as Irish Creamery Butter might so far as that description is concerned be manufactured either in County Cork or in County Down. There should be an indication of origin bearing either the word " Eire " or the word " Empire."

The case must be sent back to the resident magistrate to proceed according to law.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitors for the defendant : *J. C. W. Rea & Son.*

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C.A. 1939.

Feb. 13, 17.

Civil Bill Appeal—Case stated after judgment delivered—Jurisdiction—Civil-bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 *Vict.*, *c.* 99), *section* 35.

A Judge of Assize has no jurisdiction, after judgment has been delivered in an ordinary Civil Bill Appeal, to direct a special case to be stated for the opinion of the Superior Court under the Civil-bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 Vict., c. 99), section 35.

CASE STATED by Babington, L.J. :—

A Civil Bill claiming damages for the obstruction of a way was dismissed by the Deputy Recorder of Belfast. The plaintiff appealed to the Judge of Assize. Babington, L.J., heard the case and delivered judgment for the plaintiff. Counsel for the respondent thereupon applied to the Judge to direct a case to be stated for the opinion of the Superior Court on a question of law which had arisen on the trial. Counsel for the appellant contended that no such direction can be given after judgment. Babington, L.J., stated a case in which the first question was: "Must the application for a case stated be made before judgment?"

MacDermott, K.C., and *Patton* for the appellant :—

Jurisdiction to state a case is conferred by section 35 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, which provides that "it shall be "lawful for any Judge of Assize upon the trial of any "appeal to direct a special case to be stated for the "opinion of a Superior Court of Common Law in "Ireland in case any question of law shall arise before "him on the trial of any appeal which, in his opinion, "may be proper to be decided by a Superior Court of "Common Law."

(1) In the Court of Appeal before Andrews, L.C.J., and Brown, J.

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The Judge of Assize has jurisdiction to state a case until judgment is perfected.

The process of appeal is only complete when the Judge has made his order. In the present case the order is still open.

The words " upon the trial " include any time until the appeal is finally determined, that is, until the Judge has signed the decree.

It was held in *Pennefather v. Tobin and Others* (1), that the decree or dismiss is the document signed by the County Court Judge, not the oral decision.

In *Millensted v. Grosvenor House (Park Lane), Limited* (2), Farwell, J., said at page 726 : " It is now " well settled that until an order has been perfected, " by being passed and entered, there is no final order, " and, consequently, the Judge may, at any time until " the order is perfected, vary or alter the order which " he had intended to make."

[They also referred to *West Ham Union v. Edmonton Union* (3).]

Black, K.C., and *Sheil*, for the respondent :—

The Court of Appeal is slow to overrule a course of procedure which has existed for a long period of time and has frequently been acted upon. *Fraser v. Ehrensperger* (4). It has long been the settled practice of these courts that an application to state a case is late when made after judgment has been delivered.

The words " upon the trial " mean " at " or " during " the trial. The trial is ended when judgment has been delivered.

The case stated is for the " opinion " of the Superior Court. The jurisdiction of the Superior Court is consultative in ordinary civil bill appeals whereas in an equity civil bill appeal under section 8 of the County Court Appeals (Ireland) Act, 1899, the case is stated expressly by way of " appeal " from the " decision " of the Judge of Assize.

(1) 18 I.L.T. 54.
(2) [1937] 1 K.B. 717.
(3) [1908] A.C. 1.
(4) 12 Q.B.D. 310.

In *H. v. Guardians of the Poor of the North Dublin Union* (1), an application for a case stated was made within a week from the affirmance of a decree and Morris, C.J., refused to state a case on the ground that the judgment on the appeal had been actually delivered before any such requisition was made by the appellant. A footnote to the *North Dublin Union Case* (1) refers to a decision of Mr. Justice Andrews in *Andrews v. Dodds* (2), in which an application for a case stated after judgment was refused on the same ground.

MacDermott, K.C., replied.

ANDREWS, L.C.J.

ANDREWS, L.C.J., delivered the judgment of the Court as follows :—

This is a case stated by Babington, L.J., sitting for the hearing of civil bill appeals from the Deputy Recorder of Belfast. The civil bill claimed damages for alleged obstruction of a way upon which the defendant succeeded before the Deputy Recorder. The learned Lord Justice, after a full hearing of both the facts and law of the case, reserved judgment which he subsequently delivered in favour of the appellant. Immediately after such judgment Mr. MacDermott for the respondent applied for a case stated which the learned Lord Justice agreed to state on a question of law. Mr. Sheil, for the appellant, objected to a case being stated on the ground that it should have been applied for before judgment. Thereupon the learned Lord Justice decided that he would state a case containing two questions, the first of which would be :— "Must the application for a case stated be made before "judgment?" It is this question with which we are alone concerned in the present judgment.

In our opinion the application to state a case was late when made after judgment. We base our opinion upon :—(1) The true construction of the relevant statutes ; (2) Recognised authority of long standing which should not be disturbed ; and (3) The practice of the Courts.

(1) 16 L.R.I. 268. (2) Not reported.

C.A. 1939.

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First, as to the statutes. The power to state a case on the hearing of an ordinary civil bill appeal is contained in section 35 of the Civil-bill Courts (Ireland) Act, 1864, by which it is enacted that "it shall be "lawful for any Judge of Assize upon the trial of any "appeal to direct a special case to be stated for the "opinion of a superior Court of Common Law in "Ireland in case any question of law shall arise before "him on the trial of any appeal which in his opinion "may be proper to be decided by a superior Court "of Common Law."

The important words of this section for our present purpose are (*a*) that the Judge's direction that a case be stated must be given "upon the trial of an appeal" and (*b*) that what is sought by the case stated is the opinion, not the decision, of the Superior Court. In our opinion, the natural and proper meaning to be assigned the words "upon the trial" is "at" or "during" the trial, and these do not include the period subsequent to judgment and before the signing of the decree. When judgment is delivered all issues of fact and law have been determined, and the trial in the ordinary acceptation of the term and in accordance with the derivative meaning of the word is at an end. This is in our view made doubly clear by the use of the word "opinion." We adopt Mr. Black's phrase when he says that the jurisdiction of the Superior Court is consultative. It is whilst the Judge is in difficulty as to what his decision should be upon an important legal issue, and not after he has resolved his doubts, that he should seek the guiding opinion of the Superior Court. Notwithstanding that their opinion has been sought, the decision rests with the trial judge who signs the decree or dismiss as the case may be.

The procedure under this section of the Act of 1864 may advantageously be contrasted with that of cases stated in equity and probate matters under section 8 of The County Court Appeals (Ireland) Act, 1889. In such cases the case stated is expressly by way of "appeal" from the "decision" of the judge of assize, the Lord Chancellor, or other judge, as the

case may be. This fundamental difference in procedure under the two sections was fully recognised by the Rules Committee as appears by the Rules in Parts 3 and 7 of Order 59.

Secondly, as to authority. The point in issue was in our opinion definitely considered and determined by Morris, C.J., in *H. v. Guardians of the Poor of the North Dublin Union* (1). In that case an application for a case stated was made to the Lord Chief Justice within a week from the affirmance of a decree. The point was made for the respondents that the Chief Justice could not exercise the jurisdiction "after he "had delivered judgment." For the appellant it was argued that the stating of a special case was discretionary with the appellate judge, and that it would be unreasonable to hold that, when his judgment on the facts was delivered, his discretionary jurisdiction to state a special case on a mixed question of law and fact had ceased. The Lord Chief Justice, in refusing to state a case, distinguished the case before him from *The Guardians of the Callan Union v. Armstrong* (2), on the ground that in the latter case, in which a case had been stated, the judge was called on to state a special case before he had delivered judgment, whereas in the case then before him "judgment on the appeal "had been actually delivered before any such requis- "ition was made on behalf of the appellant and on "that ground he must refuse the application."

A footnote to this *North Dublin Union Case* (1) contains a reference to a decision of Mr. Justice Andrews, sitting at Nisi Prius on the same day on an appeal from the Recorder of Dublin, in *Andrews v. Dodds* (3), in which an application for a case stated after delivery of judgment was ruled in the same manner. The decision of Morris, L.C.J., in the *North Dublin Union Case* (1) is noted in Carleton's standard work on County Court Practice, and it has never since been overruled or even questioned in any reported case. The weight to be attached to such decisions of old standing, especially upon matters of procedure, is emphasised by Brett,

(1) 16 L.R.I. 268.
(2) 16 L.R.I. 33.
(3) Not reported.

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M.R., in *Fraser v. Ehrensperger* (1). The authority of his words is not in our opinion shaken, rather is it affirmed, by the speeches of the Law Lords in *Bourne v. Keane* (2), where the principal cases on the subject are collected and fully discussed.

Finally, we turn to the practice of the courts. If this has not been always uniform, as would appear from the words of Babington, L.J., who says that he has known cases to be stated even after judgment, we can speak for the practice of the old North-East Circuit for some twenty years upon which it was consistently ruled that an application for a case stated made after judgment on the hearing of an ordinary civil bill appeal was too late ; and we can only assume that any departure from this practice on any other Circuit must have been made inadvertently without legal argument, as it is difficult to conceive that if the decision in the *North Dublin Union Case* (3) had ever been disapproved of no record of such disapproval would be found in our reports.

On the question of costs, when we intimated at the close of the arguments that our decision was against the respondent for reasons which we would state in this judgment, Mr. MacDermott submitted that there could be no costs of a case stated which we had held that there was no jurisdiction to state. In our opinion this submission cannot be entertained. On the opening of the case stated it was pointed out by the Court that a difficulty arose in dealing with the question of jurisdiction, as, if the Court came to the conclusion that the application for the case stated was late, it must follow that the case was, strictly speaking, stated without jurisdiction, and the Court would, accordingly, have difficulty in giving an answer to any question contained in it. As the point was, however, regarded as one of considerable importance on which our opinion was desired, we proceeded with the hearing with the full approval of both parties, and on the understanding that, notwithstanding this technical difficulty, we should answer the question

(1) 12 Q.B.D. 310.
(2) [1919] A.C. 815.
(3) 16 L.R.I. 268.

submitted. This we are accordingly doing; and it would be manifestly unjust if in such circumstances costs did not follow the event in the ordinary way. We measure the costs of the case stated at £15 15*s.* 0*d.*

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Solicitors for appellant: *Martin H. Turnbull & Co.*
Solicitors for respondent: *T. G. Menary & Son.*

J. R.

C.A. 1939.

April 20.
May 4.

In re STUART, DECEASED. CORRIGAN v. DEMPSEY AND ANOTHER (1).

Lunacy—Compulsory acquisition of lunatic's real property—Compensation money—Conversion—Lunacy Regulation (Ireland) Act, 1871 (34 & 35 *Vict., c.* 22), *sections* 63 *and* 67—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict., c.* 18), *section* 69.

The owner of a fee farm rent who had made a will by which she devised it to the plaintiff became a person of unsound mind and incapable of managing her affairs and was so found by the Lord Chancellor of Ireland.

Under the Belfast Corporation Act (Northern Ireland), 1924, the rent was compulsorily acquired by the Belfast Corporation, and pursuant to an order of the Lord Chief Justice, directing that the committee should be at liberty in the name of the person of unsound mind to execute a conveyance of the rent to the Corporation, the rent was conveyed to the Corporation, and the amount awarded for compensation was lodged in Court to the credit of the Lunacy Matter.

The testatrix afterwards died.

Held, by the Court of Appeal—

(1) That this was not a "sale" under the Lunacy Regulation (Ireland) Act, 1871.; and

(2) (reversing the order of Megaw, J.), that section 69 of the Land Clauses Consolidation Act, 1845, applied; that under it there had been a constructive re-conversion of the money awarded for compensation, and that the plaintiff was entitled to it.

Appeal by the plaintiff from an Order of Megaw, J., made on 28th February, 1939, on the hearing of an Originating Summons.

The facts of the case are fully set out in the judgment of the Court.

Campbell, K.C., and *Stewart*, for the plaintiff and appellant :—

(1) In the Court of Appeal before Andrews, L.C.J., Babington and Murphy, L.JJ.

An owner has the right to determine what form his property shall take: *Fletcher v. Ashburner* (1).

The premises could not have been acquired by the Belfast Corporation without an order by the Lord Chief Justice directing a sale: *Tink v. Rundle* (2).

In re Wade (3). Consequently there was a "sale" under section 63 of the Lunacy Regulation (Ireland) Act, 1871, and section 67 of that Act applies and the money awarded as compensation has the same nature as the estate sold.

Alternatively the case is governed by section 69 of the Land Clauses Consolidation Act, 1845, incorporated by the Belfast Corporation Act, 1924, by which the Corporation was empowered to acquire the premises, and the money awarded by the arbitrator bears the character of realty. *In re Harrop's Estate* (4), *Kelland v. Fulford* (5), *Hopkinson v. Richardson* (6).

The compulsory sale of the lands of a person of unsound mind does not affect a conversion: *In re Tugwell* (7). In that case where land belonging to a lunatic had been acquired by a public body under statutory powers and the lunatic afterwards died intestate, being still of unsound mind it was held that the land had never been converted into personalty and that the heir was entitled to the money.

This is a matter outside the ordinary course of management and is thus governed by the general principle, laid down by James, L.J., in *In re Barker* (8), that it is the duty of the Court, so far as possible, not to alter the character of the lunatic's property or alter any rights of succession. This "broad general "principle" was approved of in *Attorney-General v. Marquis of Ailesbury* (9) and applied in *Latham v. Travers* (10) and *Penrhyn v. Robarts* (11). And this principle applies whether the sale is compulsory or not: *In re Wharton* (12): *In re Alston* (13).

(1) 1 Bro. C.C. 499.
(2) 10 Beav. 318.
(3) 1 H. & Tw. 202.
(4) 3 Drew 726.
(5) 6 Ch. D. 491.
(6) [1913] 1 Ch. 284.
(7) 27 Ch. D. 309.
(8) 17 Ch. D. 241.
(9) 12 A.C. 672.
(10) [1912] 1 I.R. 306.
(11) [1923] 1 Ch. 143.
(12) [1854] 5 D.M. & G. 33.
(13) [1917] 2 Ch. 226.

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The underlying principle of ademption is revocation. There must be at least the ability to revoke the will which is denied to the person of unsound mind so found.

[They also referred to *In re Kiernan* (1): *In re E. B.* (2): *In re Gates* (3); and *O'Connell v. Harrison* (4).]

McKean, K.C., and *Nicholson*, for the defendants and respondents:—

This was not really a sale by order of the Lord Chief Justice but was a compulsory acquisition by the Belfast Corporation under statutory powers. This has the same effect as if the premises were sold by a person *sui juris* and the realty was thereby converted into personalty and the devise adeemed. *Steed v. Preece* (5): *Burgess v. Booth* (6).

In *In re Bick* (7) it was held that a devise of the rentcharge on a house was adeemed by the subsequent acquisition by the testator of the fee simple of the house. This applies to compulsory acquisition: *Frewen v. Frewen* (8). In that case it was held that a devise of advowsons was adeemed by an Act of Parliament abolishing advowsons and giving compensation to the owners.

Unless section 67 of the Lunacy Regulation (Ireland) Act, 1871, applies the matter stands in same way as if there was no lunacy. In *In re Freer, Freer v. Freer* (9), Chitty, J., said at page 627, that "the law places the estate of the lunatic in the same position as if there had been no lunacy except for the 119th section of the Lunacy Regulation Act, 1853" (which corresponds with section 67 of the Irish Act of 1871). Section 63 specifies the purposes for which a lunatic's property may be sold. These purposes have been extended to sale under the Irish Land Act, 1903: *Latham v. Travers* (10).

(1) [1922] 1 I.R. 1.
(2) [1929] I.R. 550.
(3) [1930] 1 Ch. 199.
(4) [1927] I.R. 330.
(5) L.R. 18 Eq. 192.
(6) [1908] 2 Ch. 648.
(7) [1920] 1 Ch. 488.
(8) L.R. 10 Ch. 613.
(9) 22 Ch. D. 622.
(10) [1912] 1 I.R. 141.

Compulsory sale is not one of these purposes and the Act of 1871 therefore has no application in such cases.

The rule in *Attorney-General v. Marquis of Ailesbury* (1) does not apply as this matter is not one which is "outside the ordinary course of management."

Section 69 of the Land Clauses Consolidation Act, 1845, only applies to a settlement where a person has a qualified or special interest. The cases relied upon by the appellant under section 69 are all cases of settlements or infancy (in which case a settlement is presumed).

The *dictum* of James, L.J., in *In re Barker* (2), must be read subject to the limitation that where land is settled there is to be a re-conversion.

[They also referred to *Ex parte Flamank* (3) and *Hartley v. Pendarves* (4).]

Campbell, K.C. replied.

Cur. ad. vult.

MURPHY, L.J.

MURPHY, L.J., delivered the judgment of the Court.

This is an appeal by the plaintiff against an order of Megaw, J., made on the 28th February, 1939, on the hearing of an originating Summons.

The plaintiff is the surviving executor and a devisee and legatee under the will of Mary T. Stuart. The will is dated 26th April, 1913. The testatrix died on the 19th February, 1935, and probate of her will was granted to the plaintiff on the 28th October, 1935. At the time of the execution of this will the testatrix was the owner of a fee farm rent issuing out of premises known as No. 11 Newtownards Road, Belfast, which were held by the occupier under a sub-fee farm grant executed by her at the yearly rent of £45. By her will she made a gift of these premises to the plaintiff in these terms: "I will and bequeath to the aforesaid Charles Corrigan the rent of £45 annually accruing out of No. 11 Newtownards Road, Belfast." After

(1) 12 A.C. 672.
(2) 17 Ch.D. 241.
(3) 1 Sim. (N.S.) 260.
(4) [1901] 2 Ch. 498.

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executing her will Mary T. Stuart became of unsound mind and an order in lunacy was made by the Lord Chancellor on the 26th January, 1918.

Under their Act of 1924 the Belfast Corporation were empowered to acquire compulsorily for street-widening purposes (*inter alia*) the premises No. 11 Newtownards Road, and as appears from an order in lunacy made by the Lord Chief Justice of Northern Ireland, on the 27th March, 1931, and a conveyance executed on the 1st December, 1931, pursuant to this order, the sum of £681 (which included a valuer's fee of £5 5*s.* 0*d.*) was awarded by the arbitrator as the price to be paid by the corporation for these premises. Under the order of the Lord Chief Justice the sum of £675 15*s.* 0*d.* was lodged to the credit of the lunacy matter and invested. The originating summons was issued for the determination of certain questions, with the first of which we are solely concerned. The first-named defendant is a beneficiary under the will and the second named defendant is also a beneficiary and is believed to be one of the next-of-kin and heiress-at-law of Mary T. Stuart. The first question asked was whether in the events which have happened and upon the true construction of the will of Mary T. Stuart, the plaintiff under the devise in the will already referred to was entitled to the sum of £675 15*s.* 0*d.* the compensation paid in respect of the compulsory acquisition of these premises. Megaw, J., answered this question in the negative. The plaintiff as appellant seeks to have this order reversed, and this question answered in the affirmative.

The case has been very well argued and the Court is indebted to the learned counsel on both sides for the assistance which they have given.

If this was a case of a " sale " under section 63 of the Lunacy Regulation (Ireland) Act, 1871 (34 Vict., c. 22), section 67 of the same Act would apply, and the first question in the originating summons must be answered in the affirmative.

In our opinion, there was not in the present case a sale under section 63. It should be noted that under the section the Lord Chancellor was empowered (*inter*

alia) to sell the estate or interest of the lunatic in land or stock for the purpose of raising money to be applied for the purposes specified in the section. The section does not confer upon the Lord Chancellor the power of ordering a sale of the lunatic's lands for any other purpose. The sale must be for the purpose of raising money for all or any of the purposes specified, and, in addition, before ordering a sale, the Lord Chancellor must be satisfied that such a sale would be just and reasonable or for the lunatic's benefit.

The order in lunacy in the present case made by Sir William Moore, Lord Chief Justice, on the 31st July, 1931, does *not* order a sale, but (by Consequential Direction No. 8) directed that the committee should be at liberty in the name of the person of unsound mind, Mary T. Stuart, to execute a conveyance to the Belfast Corporation of the interest of Mary T. Stuart in the premises, 11 Newtownards Road. It is true that this order is based on a finding by the Registrar (No. 6) that : " It appears to be just and reasonable and for the benefit of the said Mary T. Stuart that the Belfast Corporation should acquire her interest in the said property . . .," but from the conveyance, dated 1st December, 1931, it appears that the Corporation were authorised to purchase and take compulsorily these premises under and by virtue of the Belfast Corporation Act, 1924, that there was an arbitration, and that the sum of £681 was awarded (doubtless this sum was agreed upon) as the price to be paid by the Corporation. The Belfast Corporation Act, 1924, provided (by Section 31), *inter alia*, for the widening of parts of the Newtownards Road, and section 51 and some following sections provided for the acquisition of all or any of the lands shown on the deposited plans which were required for the purposes of the works authorised by the Act. Section 26 of the Belfast Corporation Act (Northern Ireland), 1923, was incorporated by section 52, and this section 26 provided that for the purpose of taking land compulsorily and of determining the amount of compensation payable by the Corporation, the Lands Clauses Acts should be deemed to be amended by the second schedule to

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"The Housing of the Working Classes Act, 1890," and the Acquisition of Land (Assessment of Compensation) Act, 1919. We cannot agree with the argument of Mr. Campbell, K.C., that these premises could not have been acquired by the Corporation without an order of the Lord Chief Justice directing a sale—neither of the cases cited by him, *Tink v. Rundle* (1), and *In re Wade* (2) establish such a remarkable proposition—and, in our opinion, this was not a sale under the Lunacy Regulation (Ireland) Act, 1871.

In his able argument, Mr. Stewart summarized the case presented by Mr. Campbell, K.C., and himself on behalf of the appellant in five propositions. Having first submitted that the case was governed by section 67 of the Lunacy Regulation (Ireland) Act, 1871, he secondly submitted that, if this was not so, the case was governed by section 69 of the Lands Clauses Consolidation Act, 1845, and that the money awarded as compensation "bore the character of realty" (*re Harrop's Estate* (3). This section is not affected by the provisions in the second schedule to the Housing of the Working Classes Act, 1890; it expressly refers to "the purchase money or compensation . . . payable in respect of any lands . . . taken . . . from any . . . committee of Lunatic. . ." We cannot adopt the argument of Mr. Nicholson that the effect of these words is controlled by the subsequent words "or person having a partial or qualified interest only in such lands," and that the section does not therefore apply to the present case.

Kelland v. Fulford (4) (to which we were referred by Mr. Campbell) shows that "settled" in the latter part of section 69 of the Lands Clauses Act means simply "standing limited." Section 69 provides that the purchase money or compensation "which shall be payable in respect of any lands . . . purchased or taken by the promoters of the undertaking from any . . . . committee of lunatic," if amounting to or exceeding £200, should be paid into the bank to the account of the Accountant-General and that the

(1) 10 Beav. 318.
(2) 1 H. & Tw. 202.
(3) 3 Drew. 726.
(4) 6 Ch.D. 491.

monies should remain so deposited until they were applied " to some one or more of the following purposes, that is to say, in the purchase or redemption of the Land Tax . . . or in the purchase of other lands to be conveyed limited and settled . . . in the same manner as the lands in respect of which such money shall have been paid stood settled." The section further provides that the money might be applied in removing or replacing buildings, " thus further shewing," as pointed out by Sir George Jessel, M.R., an intention of placing the persons from whom the lands have been taken as nearly as possible in the same position as they were before," and, lastly, that the money might be applied " in payment to any party entitled to such money." These words, as Sir George Jessel says, obviously mean " entitled to his or her own " use " as, for instance, when an infant attains twenty-one or a married woman becomes discovert ; that is to say—reading this 69th section with the 7th section—" till the person becomes entitled to the money to his or her own use, there is a constructive reconversion which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand limited to the same uses as the lands sold stood limited, and therefore must be considered as land."

We are of opinion, therefore, that section 69 of the Lands Clauses Consolidation Act, 1845, applies ; that under it there has been a constructive reconversion ; that this sum of £675 15*s.* 0*d.* therefore bears the character of realty ; and that on the true construction of the will of Mary T. Stuart the plaintiff is entitled to this money under the devise to him.

The decision of Lord Cranworth, V.C., in *Ex parte Flamank* (1), does not affect the view we have formed of the operation of section 69 of the Lands Clauses Act, 1845. Lord Cranworth was dealing with the case of a person " in a state of mental imbecility " but *not* a person found to be a lunatic, and section 69—which was evidently considered by him—did not apply.

It is not necessary therefore to consider the emphatic

(1) 1 Sim (N.S.) 260.

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terms in which Pearson, J., in *In re Tugwell* (1), dissented from the judgment of Lord Cranworth. This latter case is cited in the Hailsham Edition, of Halsbury's Laws of England, Vol. XIII., page 140, note N., as the authority for the proposition that a compulsory sale of the land of a person of unsound mind does not " apparently " effect a conversion.

The passage in the judgment of James, L.J., in *In re Barker* (2), which is quoted with approval by Lord Macnaghten in *Attorney-General v. Marquis of Ailesbury* (3) : " When property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property which would naturally follow such change, the presumption is, if the words in the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or legitimate expectations of any persons whatsoever," is stated by the Lord Justice—with the evident approval of Lord Macnaghten—as a broad, general principle, but, as pointed out by Mr. Nicholson, in *In re Barker* (2), the land had been sold under the Partition Act of 1868 which, as James L.J., said, must be read " as if all the " 23rd to the 25th clauses of the Settled Estates Act were repeated *totidem verbis* in the Partition Act." Under section 23 of the Settled Estates Act all money received under any sale of real estate made under the authority of the Settled Estates Act must be paid into Court and re-invested in land to be settled to the same uses or paid to the persons becoming absolutely entitled. These words as to re-investment and settlement did effect a re-conversion, and this is the *ratio decidendi.*

The " broad general principle " stated by James, L.J., though not conclusive in itself, should be our guide in considering section 69 of the Lands Clauses Act as it was the guide of the Court in considering sections 23 to 25 of the Settled Estates Act, the provisions of

(1) 27 Ch.D. 309.
(2) 17 Ch.D. 241.
(3) 12 A.C. 672.

section 23 being in all material respects identical with those of section 69 of the Lands Clauses Act.

We have been referred by counsel on either side to a number of decisions, with some of which we propose to deal shortly. *Latham v. Travers* (1) does not affect the present question, as the subject-matter for decision there was a sale under section 26 of the Irish Land Act, 1903, but the *limited* power of sale of the lands of a lunatic vested in the Lord Chancellor under the Lunacy Act, 1871, is emphasized in the judgment of the Lord Chancellor. The decision of Powell, J., in *In re Kiernan* (2) (followed by Kennedy, C.J., in *In re E. B.* (3)), is of importance when applied to the present case as stating the well-established principle that " the quality of a lunatic's estate will not, if possible, be changed during the continuance of his " disability."

In *Penrhyn v. Robarts* (4), Lawrence, J., applied the " broad general principle " stated by James, L.J., in *In re Barker* (5), to a sum paid under section 16 of the Welsh Church Act, 1914, by way of compensation for the extinction of the right of patronage of a benefice subject to a settlement, and held that it did not belong to the tenant for life as lay patron ; and, as pointed out by Mr. Stewart, the same " broad principle " was quoted and applied by Swinfen Eady, J., in the earlier case of *Hopkinson v. Richardson* (6), when an infant's share of the proceeds of a sale of real estate sold in a partition action by the Court, though sold at his request and for his benefit, was held not to have been converted.

In *Re X.* (7) Sir James Campbell, L.C., expressed approval of the " reasoning " of Pearson, J., in *Re Tugwell* (8) as against the decision of Cranworth, V.C., in *Ex parte Flamank* (9), and although he intimated that if the parties would not agree to take " the judgment of " Solomon " and divide the fund the case would require further argument, he appears to have given effect to

(1) [1912] 1 I.R. 306.
(2) [1922] 1 I.R. 1.
(3) [1929] I.R. 550.
(4) [1923] 1 Ch. 143.
(5) 17 Ch.D. 241.
(6) [1913] 1 Ch. 284.
(7) 53 I.L.T.R. 53.
(8) 27 Ch.D. 309.
(9) 1 Sim. (N.S.) 260.

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the view that the proceeds of the sale of lands of a lunatic compulsorily acquired for the purpose of the Labourers (Ireland) Acts were to be treated as real estate.

The sentence quoted by Mr. Nicholson from the judgment of Chitty, J., in *In re Freer* (1) ("for the law places the estate of the lunatic in the same position as if there had been no lunacy except for the 119th section of the Lunacy Regulation Act, 1853") does not appear to be altogether consistent with the "broad principle" stated by James, L.J.

In *Hartley v. Pendarves* (2) Cozens Hardy, J., held that an order made in Chancery and Lunacy, in the administration of an estate of which the tenant for life and the tenant in fee in remainder were both lunatic, for the cutting and sale of timber, was made under the general jurisdiction of the Court, and that the proceeds formed part of the personal estate of the owner in fee—this does not affect the present case. In that case Cozens Hardy, J., approved of "the view "taken" by Sir George Jessel in *Steed v. Preece* (3), and notwithstanding the contrary decision of the Vice-Chancellor in *Scott v. Scott* (4), *Steed v. Preece* (3) was expressly approved by the English Court of Appeal in *Burgess v. Borth* (5), when Farwell, L.J., quotes with approval Lewin on Trusts, 11th Edit., p. 167: "Since the decision in *Steed v. Preece* (2), it appears to be established," (the Lord Justice here interpolates "I would read 'it is established'"), "that an order of the Court rightfully made for the sale of an estate operates as a conversion from the date of the order so that the proceeds of sale are personalty." The Lord Justice says: "Conversion, *unless there be* "*statutory exception*, is absolute."

In *O'Connell v. Harrison* (6), Kennedy, C. J., refers to "the long settled policy and practice of the Court in the administration of lunatics' estates to preserve the character of their property as far as possible and to avoid disturbing the succession to such property (*Attorney-General v. Ailesbury* (7) and

(1) 22 Ch.D. 627.
(2) [1901] 2 Ch. 498.
(3) L.R. 18 Eq. 192.
(4) 9 L.R.I. 367.
(5) [1908] 2 Ch. 648.
(6) [1927] I.R. 330.
(7) 12 A.C. 672.

Lunacy Regulation (Ireland) Act, 1871), subject to the paramount obligation and duty upon the Court to provide for the maintenance and care of the patient out of his means and to manage and administer his property in his interest and for his benefit."

Our decision is based on the view which we have formed of the sections of the Lands Clauses Act referred to, but it is right to say that there appears to be considerable weight in Mr. Stewart's third argument that this is a matter "outside the ordinary course of "management" and in such a matter "it is the duty of the Court, so far as may be possible, not to alter the character of the lunatic's property or to interfere with any rights of succession." (Lord Macnaghten in *Attorney-General v. Marquis of Ailesbury* (1).

For these reasons we are of opinion that this appeal should be allowed and the first question in the originating Summons should be answered in the affirmative. The order of Megaw, J., as to the costs of the hearing before him should stand and the plaintiff (appellant) should have his costs of this appeal out of the estate of Mary T. Stuart. The defendants will abide their own costs of this appeal.

Solicitor for the appellant: *Bernard Campbell.*
Solicitors for the respondents: *E. & L. Kennedy.*

J. R.

(1) 12 A.C. 672.

K.B.D (Bank.) 1939.

Sept. 21, 28.

In the Matter of PATRICK FOX, A BANKRUPT (1).

Bankruptcy—After acquired property—Legacy bequeathed to Bankrupt—Loan to Bankrupt on security of legacy—Agreement that Bankrupt should instruct his solicitor to obtain payment of legacy and repay loan—Intervention by Assignees in Bankruptcy—Money paid by solicitor to lender—Transaction not completed before intervention by Assignees—The Irish Bankrupt and Insolvent Act, 1857 (20 *&* 21 *Vict., c.* 60), *section* 267—*Bankruptcy Amendment Act* (*Northern Ireland*), 1929 (20 *Geo.* 5, *c.* 1), *section* 16.

A bankrupt having become entitled to a pecuniary legacy applied to the P. Bank for an advance on the security of it. It was agreed that the bankrupt should instruct his solicitor, M., to obtain payment of the legacy, and to pay out of it the amount which should be advanced by the Bank. The bankrupt so instructed M., whereupon the Bank made an advance to the bankrupt.

M. received certain sums in payment of the legacy and held a balance of £200 while a sum exceeding £200 was due to the Bank on foot of the advance. The Assignees in the Bankruptcy wrote to M. requiring payment to them of the £200. After receipt of this letter M. paid the £200 to the Bank. The Assignees applied for an Order that M. should lodge that sum in Court.

Held, that there was no transaction by the bankrupt with the Bank in respect of the legacy which was completed before the intervention by the Assignees, and that M. must lodge £200 in Court.

Application by Assignees in Bankruptcy for an order that the bankrupt's solicitor lodge £200 in Court.

The bankrupt, having become entitled to a pecuniary legacy, applied to the Provincial Bank of Ireland, Ltd., for an advance on the security of the legacy, and it was agreed that he should instruct his solicitor, J. Meegan, to obtain payment of the legacy, and to pay to the Bank out of the money received by him in payment of it, such sum as should be advanced by the Bank to the bankrupt. The bankrupt having so instructed Meegan, the Bank made an advance to the bankrupt. Subsequently the bankrupt gave Meegan a power of

(1) In the King's Bench Division (Bankruptcy) before Murphy, L.J.

attorney to receive, and give a discharge for, the legacy, and Meegan gave the Bank an undertaking to apply in payment of the advance the money received by him.

On 30th January, 1939, Meegan held a sum of £200 portion of moneys which he had received in payment of the legacy, while a sum exceeding £200 was due to the Bank on foot of the advance to the bankrupt. On 30th January, 1939, Meegan received a letter from the Assignees in Bankruptcy requiring payment to them of the £200. After receipt of this letter Meegan paid the £200 to the Bank.

Warnock, K.C., and *Copeland*, for the Assignees :—

The only transactions by a bankrupt with persons dealing with him in respect of property acquired after adjudication, which are valid against Assignees in Bankruptcy, are transactions which are completed before any intervention by the Assignees, (Bankruptcy Amendment Act (Northern Ireland), 1929, section 16.) There was no such completed transaction in this case. Meegan must prove that there was an equitable assignment of the money to the Bank, and he has not done so.

Campbell, K.C., and *Grant*, for Meegan :—

Meegan acted as agent for the Bank, and before there was any intervention by the Assignees he had received the money, and he held it, as such agent. They referred to *In re Ball* (1), *Hunt v. Fripp* (2), *Cohen v. Mitchell* (3), and *In re Bennett* (4).

MURPHY, L.J. : There is no dispute as to the facts which are fully set out in the affidavits of William Moore and James G. Meegan and the documents exhibited therein. In substance, the present application on behalf of the Assignees is for an order that Mr. Meegan should lodge in Court the sum of £200, part of a legacy of £375 which became payable to the Bankrupt under the will of Rose McAleer, deceased.

(1) [1899] 2 I.R. 313.
(2) [1898] 1 Ch. 675.
(3) 25 Q.B.D. 262.
(4) [1907] 1 K.B. 149.

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Mr. Campbell admitted that the Assignees had "intervened," and the date of such intervention was the 30th January, 1939. At that date Mr. Meegan had in his possession £200 part of the said legacy, and, notwithstanding the intervention of the Assignees, he paid this sum of £200 to the Provincial Bank on the 5th May, 1939, under the circumstances deposed to in his affidavit. There is no question as to the bona fides of Mr. Meegan, and I share the regret expressed by Mr. Warnock that, in discharge of their duties, the Assignees are bound to apply for the lodgment of this sum.

The application is grounded on section 267 of the Irish Bankruptcy Act of 1857, and section 16 of the Bankruptcy Amendment Act (Northern Ireland), 1929, and the argument before me was devoted to the true construction of this latter section as applied to the facts of the present case.

On behalf of the Assignees, Mr. Warnock referred me to the proposition contained in the judgment of Lord Esher, M.R., in *Cohen v. Mitchell* (1). This proposition which, as stated by Holmes, L.J., in *In re Ball* (2), "has long ago become part of the law," is now embodied in the (English) Bankruptcy Act, 1914, section 47 (1) and the Bankruptcy Amendment Act (Northern Ireland), 1929, section 16 (1); but, as Mr. Warnock pointed out, the words "if completed before any intervention by the assignees or trustee in the bankruptcy" in the Northern Ireland Statute, and the corresponding words in the English Statute, have been added to the words of the proposition enunciated by Lord Esher. Mr. Warnock argues that, in the present case, there was no "transaction . . . for value . . . completed before the intervention by "the assignees" within section 16.

Mr. Campbell referred me to *In re Ball* (2), in which the Court of Appeal (reversing Boyd, J.) held that when executors prior to any intervention by the assignees had bona fide paid a legacy to the Bankrupt, they could not be afterwards compelled to pay the amount of the legacy over again to the assignees; to *Hunt v.*

(1) 25 Q.B.D. 262. (2) [1899] 2 I.R. 313.

Fripp (1), a case in which Byrne, J., (it being proved that the law on this point in the Colony of Victoria was the same as English law), applied the proposition laid down in *Cohen v. Mitchell* (2), to a legacy and share in a residue which, prior to the intervention of a trustee, had been made the subject of a valid equitable assignment for value; and to *In re Bennett* (3), where Bigham, J. (applying the same proposition) held that the administrator of a deceased (undischarged) bankrupt's estate, who had distributed policy moneys among his next-of-kin, was not personally liable to the trustee for the moneys he had distributed, but that the next-of-kin must refund to the trustee the shares they had respectively received. Mr. Campbell argued that the advances made by the Provincial Bank to the bankrupt prior to the 30th January, 1939, constituted a "transaction" within section 16, and he also relied on the power of attorney executed by the bankrupt and dated the 28th October, 1938. I cannot see how these advances can constitute a transaction within the section; by the last clause of sub-section (1) certain dealings between a bankrupt and his banker are deemed to be "transactions" for value between them, but the advances made by the Bank do not seem to me to constitute the undertaking given by Mr. Meegan to the Bank a transaction for value completed within the words of the section. The power of attorney is not, in form or in legal effect, an assignment; it is not "for value" (as Mr. Warnock pointed out) and so far as the £200 is concerned, the payment under Clause 6 had not been "completed" before the 30th January, 1939.

On this date Mr. Meegan had in his hands £200 the property of the bankrupt who had not obtained his certificate. The assignees then intervened, and I cannot find that there was any prior "transaction" which would bring the case within the relief conferred by section 16 (1) of the Act of 1929.

In the present case there had not been a payment of a legacy prior to the intervention of the assignees as in

(1) [1898] 1 Ch. 675.
(2) 25 Q.B.D. 262.
(3) [1907] 1 K.B. 149.

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In re Ball (1), or a distribution of assets of the bankrupt prior to such intervention as in *In re Bennett* (2), and there is nothing which would constitute an equitable assignment prior to intervention as in *Hunt v. Fripp* (3).

Accordingly, I must order, with regret, that Mr. Meegan do lodge this sum of £200 in Court.

Solicitors for the assignees: *N. & F. Tughan.*
Solicitor for the bankrupt: *J. G. Meegan.*

J. McC.

(1) [1899] 2 I.R. 313.
(2) [1907] 1 K.B. 149.
(3) [1898] 1 Ch. 675.

JENNINGS AND ANOTHER, APPELLANTS,
AND
KELLY, RESPONDENT (1).

H.L. (N.I.). 1939.

Oct. 10, 12. Nov. 30.

Licensing Law—New Licence—Increase of twenty-five per cent. of population—Whether in city or ward or district electoral division—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 *Geo.* 5, *c.* 12), *section* 9 (*c*)—*Intoxicating Liquor and Licensing Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 21), *section* 3 (6)—*Appeal to House of Lords—Certiorari—"Person aggrieved"—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *section* 49—*Irish Free State (Consequential Provisions) Act*, 1922 (*Session* 2) (13 *Geo.* 5, *c.* 2), *First Schedule, section* 6 (3)—*Appeal as to costs only.*

The respondent applied to the Recorder of Belfast for a new licence for the sale of intoxicating liquor on or off the premises. The Recorder refused the application on the ground that no such licence could be granted unless there had been an increase of not less than twenty-five per cent. of the population of the City of Belfast.

The respondent then applied to the High Court for a conditional order for a writ of certiorari to remove the order of the Recorder into the High Court. This application was refused by the High Court, but was granted by the Court of Appeal. The appellants appeared in opposition to the granting of the writ, before the King's Bench Division, which discharged the conditional order with costs. The respondents then appealed to the Court of Appeal which allowed the appeal, made the conditional order absolute, and ordered the appellants to pay the costs of the proceedings. The appellants were treated throughout as competent parties in these proceedings.

Held :—

(1) That the appellants were "persons aggrieved" by the decision of the Court of Appeal and had a right of appeal to the House of Lords;

(2) That the requirements of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, are satisfied by a twenty-five per cent. increase in population in the ward or district electoral division in which the premises for which the licence is sought are situate.

Per Lord Wright.—There is no rule that the House of Lords will not entertain an appeal which goes only to costs.

Decision of the Court of Appeal in Northern Ireland affirmed.

(1) The speeches in the House of Lords are printed from Messrs. W. B. Gurney, Sons & Funnell's shorthand notes.

H.L. (N.I.). 1939.

JENNINGS AND ANOTHER, Appellants, AND KELLY, Respondent.

APPEAL from an order of the Court of Appeal in Northern Ireland (1), reversing an order of the Divisional Court.

The facts appear in the speech of the Lord Chancellor.

Wallington, *K.C.*, and *Curran* (the latter of the Bar of Northern Ireland), for the appellants :—

By the combined effect of the Government of Ireland Act, 1920, section 49 (*b*), and the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), First Schedule 6 (1), an appeal lies from the Court of Appeal in Northern Ireland to this House in any case in which a person is aggrieved by a decision of that Court. The appellants are aggrieved by this order. *Sevenoaks Urban District Council v. Twynam* (2). In any case they are aggrieved by the order that they should pay costs.

The arguments of the appellants on the construction of The Intoxicating Liquor Act (Northern Ireland), 1923, were similar to those in the Court of Appeal in Northern Ireland.

Their Lordships intimated that it was not necessary to hear counsel for the respondent on the construction of the statute.

Serjeant Sullivan, *Campbell*, *K.C.*, and *McSparran* (of the Irish Bar), and *Nicholson* (of the Bar of Northern Ireland), for the respondent :—

The appellants in this case are not persons aggrieved. The *locus standi* of the appellants at the Licensing Sessions as objectors to the granting of the licence was that of inhabitants of the parish under the Licensing (Ireland) Act, 1838, or as residents in the city under The Intoxicating Liquor Act (Northern Ireland), 1923, section 9 (*c*). As members of the public they had not any individual right or interest or any peculiar or personal grievance. Having appeared as objectors at the Licensing Sessions the Court of Appeal ordered that the appellants be served with notice of the certiorari proceedings in the High Court. Objectors

(1) [1939] N.I. 9. (2) [1929] 2 K.B. 448.

at licensing sessions are not parties to litigation There was no lis or suit. *Boulter v. Kent Justices* (1), *Powell v. Birmingham Vinegar Brewery Company, Limited* (2), *The King (Findlater) v. Justices of Dublin* (3), *The King v. Richmond Confirming Authority, Ex parte Howitt* (4), *Boyle or Walsh v. Wilson and Others* (5), *The Queen v. Justices of Manchester* (6).

[LORD WRIGHT: Are the appellants not persons aggrieved by costs having been awarded against them?]

The appellants have not specified this ruling as to costs as one of the grounds for their appeal. The House does not entertain appeals merely on the question of costs.

The House took time for consideration.

VISCOUNT MAUGHAM, L.C.: My Lords, this is an appeal from an order of His Majesty's Court of Appeal in Northern Ireland, dated the 20th June, 1938. The main point involved is the question of the true construction of a section of the Intoxicating Liquor Act (Northern Ireland), 1923—which I shall call the Act of 1923—a matter on which there has been in Northern Ireland a considerable difference of opinion, due, I think, to the unfortunate way in which the section is drafted. There was also raised before your Lordships the question whether an appeal to this House was competent in this case, the contention of the respondent being that the appellants were not "parties aggrieved" by the decision of the Court of Appeal. The dispute relates to the granting of a licence for the sale of intoxicating liquors in the city of Belfast. The facts are not in dispute and may be shortly stated.

The appellant, John Barnabas Jennings, is a Methodist minister, and the appellant, Elijah Quincey, is a retired merchant, and both the appellants are inhabitants of the parish of Knockbreda, in the county of the city or county borough of Belfast in Northern

(1) [1897] A.C. 556.
(2) [1894] A.C. 8.
(3) [1904] 2 I.R. 75.
(4) [1921] 1 K.B. 248.
(5) [1907] A.C. 45.
(6) [1899] 1 Q.B. 571.

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Ireland. The respondent, James Kelly, is a licensed vintner residing and carrying on business in the county of the city of Belfast. He applied under section 9 of the Act of 1923 for a licence for certain premises in the Ormeau Ward of the city or county. The application was heard by His Honour Judge Thompson, Recorder of Belfast, the licensing authority for the district. The appellants were present as objectors and by their counsel opposed the application on the ground that the conditions as to population required by the Act (which I shall state later) had not been complied with.

An increase of not less than 25 per cent. in the population of Ormeau Ward was proved by the certificate of the Minister of Home Affairs for Northern Ireland, and in addition proof was given of a growth of the city of Belfast owing to such increase. The respondent admitted that the population of the city was, according to the census, 386,947 in the year 1911 (the year of the last census before the passing of the Act of 1923) and 415,151 in the year 1926—an increase of less than 25 per cent.—whereupon the Recorder stated that he was bound by the recent decision of the King's Bench Division in *The King* (*Rainey*) *v. the Recorder of Belfast* (1), to hold that it was necessary to prove an increase of 25 per cent. in the population of the city. On the 10th day of September, 1937, the Recorder, after delivering a reasoned judgment, made the following Order :—

"It appearing that there has been an increase "of the population since the census ascertained "next before the passing of the Licensing Act, "1923 :—

"(*a*) of less than 25 per cent. in the case of the "city of Belfast ; and

"(*b*) of more than 25 per cent. in the case of "Ormeau Ward in which the premises proposed "to be licensed are situated and such increase "being insufficient in law to warrant the granting "of a certificate for a licence.

"Refuse the application on that ground."

(1) [1938] N.I. 10.

It should be added that the Recorder in his written judgment pointed out in very clear language the difficulties to which the decision of the King's Bench Division gave rise.

The respondent then applied to the King's Bench Division for a conditional order for a writ of certiorari directed to the Recorder to remove into the King's Bench Division his orders and adjudications in the matter for the purpose of quashing the same. On the 9th March, 1938, this order was refused.

The respondent then appealed to the Court of Appeal of Northern Ireland seeking a conditional order to the effect above stated, and on the 25th April, 1938, the order of the King's Bench Division was discharged and the conditional order granted. The condition included the words, "unless cause be shown to the "contrary within ten days after service of this order "upon Samuel Henry, Esquire, solicitor for" the appellants, and on certain officials.

The conditional order so granted was in its turn discharged by the King's Bench Division on the 17th May, 1938. From that order there was again an appeal to the Court of Appeal, the notice of appeal being served on the solicitor for the appellants.

Upon the hearing of the appeal the Court of Appeal (Lord Chief Justice Andrews and Lords Justices Best and Babington) made an order, dated the 20th day of June, 1938, allowing the said appeal and setting aside and discharging the order of the 17th day of May, 1938, and making absolute the said conditional order of certiorari, dated the 25th day of April, 1938, notwithstanding cause shown, and further ordering (*inter alia*) that a writ of certiorari do issue directed to the Recorder of Belfast to remove into the King's Bench Division of the High Court of Justice in Northern Ireland for the purpose of being quashed (*inter alia*) all and singular orders and adjudications of the Recorder made at Belfast on the 10th day of September, 1937, refusing the respondent's application for a certificate. The appellants were ordered to pay the costs to the respondent.

It is from that order that the present appeal is

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brought. The Lord Chief Justice dissented from Lords Justices Best and Babington and agreed with the decision of the King's Bench Division.

It will be desirable to set out in full the terms of Section 9, sub-section (*c*), of the Act of 1923, though the whole section should be read, and it is desirable to bear in mind that the section—which replaced as regards Northern Ireland with certain alterations an earlier Act of 1902 relating to all Ireland—contained a prohibition of the granting of any fresh licences in Northern Ireland except in certain specified cases.

9.(*c*) "Where owing to an increase of not less than "twenty-five per cent. of the population according to "the last census, there is a growth or an extension of "any city or town, and the licensing authority is "satisfied after hearing any evidence tendered to it by "any resident or owner of property in such city or "town that the restrictions in this section on the "granting of licences may be relaxed, the licensing "authority may grant a licence to any applicant "notwithstanding that the same would be otherwise "forbidden by this section:

"Provided that such licence shall be granted only "for premises situate in the ward or district electoral "division in which such increase of population has "taken place, and in substitution for at least two "existing licences held in respect of premises situate "within the city or town (as the case may be) com-"prising such ward or district electoral division."

A question arose as to how the required increase in population should be proved, and accordingly by the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, it was provided as follows: section 3, sub-section 6 (iv): "The required increase of population "shall be proved by means of a certificate of the "Minister of Home Affairs that he is satisfied that there "has been an increase of not less than 25 per cent. "since the census ascertained next before the passing "of the Act of 1923."

Two points have been argued upon the appeal. The respondent has contended that the appeal should be dismissed as incompetent on the ground that the

appeal to this House can only be justified under section 49 (*a*), (*b*) of the Government of Ireland Act, 1920, 10 & 11 George V., Chapter 67, made applicable to Northern Ireland by the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), First Schedule, section 6 (3). The appellants, it was said, must therefore show that they are " persons aggrieved " by the decision of the Court of Appeal, and it was denied that they were.

My Lords, I have found myself unable to accept this contention. Not only were the appellants persons who in the various proceedings which I have above detailed had been treated as objectors entitled to appear and be heard in the King's Bench Division and in the Court of Appeal, but they had been ordered to pay the costs of the proceedings by the order under appeal to this House. On this point, however, I have had the advantage of reading the judgment of my noble and learned friend Lord Wright, and I observe that he has completely dealt with it and with the arguments relied on by the respondent in support of it. I entirely agree with his view of this contention, and will therefore add nothing further of my own. The appeal in my judgment is a competent appeal.

The main point is that of the true construction of section 9, sub-section (*c*), which I have set out above. It is clear from the words of the proviso that the licence can only be granted if there has been an increase of not less than 25 per cent. of the population of the ward (I will omit the words " or district electoral division " for the sake of brevity) in which the application for a licence is being made. Is it also necessary that a second condition as to population should be satisfied, namely, that there must be an increase of not less than 25 per cent. in the population of the city or town ? The Court of Appeal has by a majority answered this question in the negative, and the learned Recorder showed by his written judgment that he shared this view ; but, as I have said, the Lord Chief Justice and the Judges of the King's Bench Division were for answering it in the affirmative.

The section is in several respects curiously framed.

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It begins by requiring that there should be a growth or an extension of the city or town *owing to* an increase of not less than 25 per cent. of the population according to the last census. It is clear that such an increase requires a comparison between a previous and a subsequent number of the population ; but this could not be ascertained merely by the last census before the Act of 1923. This difficulty is resolved by section 3 of the Act of 1927, which no doubt requires the Minister to make a comparison of the population ascertained at the last census before the Act of 1923 and of the existing population (presumably) at the date of the application for the licence. Plainly, from the words of the proviso, this certificate must apply to the increase in population of the ward ; and the question is, must there also be a certificate as to the increase in population of the city or town ? Nor is it very easy to say what is meant by the words, " a growth or an " extension of any city or town." " Extension " seems to point to an extension in area, and if so " growth " would appear to mean a growth in population. If this is correct, and if growth refers to an increase in population of the city or town, there would seem to be considerable force in the observation that this might have been easily expressed by saying, " Where owing to an increase of not less than 25 per " cent. of the population of any city or town according " to the last census or to its extension." Such an increase in population must obviously result in a growth (if not an extension) of the city or town. Why, then, provide that the growth or the extension must be due to the increase in population of the same area ?

The licensing authority must also be satisfied by the evidence that the restrictions in the section on the granting of licences may be relaxed. The relaxation is, indeed, not of a very drastic character, since the total number of licences in the city or town will be reduced by one if the application is granted. It has been truly observed that if the city or town has increased in population since the last census by not less than a quarter, there must necessarily be one or more wards in which there has been a similar increase.

There might, however, be an enormous increase in population of a ward and yet only an increase in population of the city by, say, 20 per cent. It would seem strange in a clause purporting to relax restrictions to prohibit the granting of a fresh licence in such a ward even though two licences were being given up in the rest of the city or town.

We must now come to the proviso, for there is, I think, no doubt that in the construction of the section the whole of it must be read and a consistent meaning, if possible, given to every part of it. The words are: "Provided that such licence shall be granted only for "premises situate in the ward or district electoral "division in which such increase in population has "taken place." There seems to be no doubt that the words "such increase in population" refer to the increase of not less than 25 per cent. of the population mentioned in the opening words of the section. If those words indicate an increase of not less than 25 per cent. of the population of the city or town, then the required condition is that the population of the ward, if the words are given their ordinary meaning, must have increased by not less than one quarter of the whole population of the city or town. This seems to me, as it seemed to the Lords Justices in the Court of Appeal, to reduce section 9 almost to a nullity; yet this is the construction which, as I understand it, found favour with the King's Bench Division. I will add that if Parliament had intended so strange and improbable an event I think that very different language would have been used. The obvious way of drafting the section, if both these conditions as to population were to be requisite, would be to couple them together, for example, by providing, "Where "there has been an increase of not less than 25 per cent. "of the population of any city or town according to "the last census and where an increase of not less "than 25 per cent. of the same population is found "to have taken place in any ward," etc. Moreover, if so large an increase in the population of a ward in a city should take place, it is a little difficult to see the necessity for evidence by residents or owners to show

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that the granting of licences in that ward might be relaxed.

Counsel for the appellants felt the force of these considerations and preferred to contend, as they seem to have contended in the Court of Appeal, that the words "such increase" might be construed to mean "such percentage of increase" or "a similar increase." My Lords, this material change in the language used is very difficult to justify, and I can only say that I see no warrant for so altering the words. It is easy to understand that if it is assumed as being beyond doubt that the introductory words in the section mean an increase of not less than 25 per cent. of the population of the city or town, then there would be ground for endeavouring to give an artificial meaning to the words "such increase" in the proviso in order that the section should have some practical effect; but that is an assumption which I am unable to accept. The curious phrasing of the section and the reference to the necessity for "a growth or extension" of the city or town suggests the necessity for an explanatory clause, and reading the whole section together it seems to me far easier to accept the view that the increase in population mentioned in the first lines of the section is an increase in the population of the ward as indicated in the proviso by the words, "the ward . . . in which "*such* increase in population has taken place." No violence is done to the words by such a construction; and it is not a disadvantage to find that it seems to carry out a practice which has prevailed in Northern Ireland for a good many years.

The learned Lord Chief Justice was influenced in coming to his conclusion by his view that the first part of the section was the operative portion of it, and that the proviso could not properly be used to explain the words as to increase of population in the operative part. He therefore relied on the principle of construction to be found in the case of *Guardians of West Derby Union v. Metropolitan Life Assurance Society* (1). The principle is thus stated by Lord Watson. "I am "perfectly clear," he said, "that if the language of

(1) [1897] A.C. 647.

"the enacting part of the statute does not contain "the provisions which are said to occur in it, you "cannot derive these provisions by implication from "a proviso." I am sure that none of your Lordships would desire to depart from this principle where it is applicable, namely, where the enacting part of the section is unambiguous and complete and is followed by a true proviso, that is, a qualification or an exception out of it.

In my view that is not the case here, and, as Lord Herschell pointed out in the same case: "Of course a "proviso may be used to guide you in the selection of "one or other of two possible constructions of the "words to be found in the enactment, and show when "there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or "that, which is the proper view to take of it." My Lords, that is precisely the method of construction which in my view is applicable in the present case. I will add that the words beginning, "Provided that," are, in my opinion, additional and explanatory words necessary for the purpose of giving a more definite meaning to the preceding words, that is, of removing doubt as to its scope, and they might easily have been incorporated in the earlier part of the section at the risk of making it rather more cumbrous than it is. We are not dealing here with a true proviso, or at any rate not with such a proviso as this House was considering in the case cited. It cannot, I think, be disputed that in construing a section of an Act of Parliament it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. A number of striking examples will be found in *Maxwell on the Interpretation of Statutes*, 8th Edition, at pages 27 and 28. This principle is equally applicable in the case of different parts of a single section, and none the less that the latter part is introduced by the words "pro-"vided that" or like words. There can, I think, be no doubt that the view expressed in *Kent's Commentaries on American Law* (cited with approval in *Maxwell*, page 140) is correct: "The true principle

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"undoubtedly is, that the sound interpretation and "meaning of the statute, on a view of the enacting "clause, saving clause, and proviso, taken and con- "strued together, is to prevail."

My Lords, I have not thought it necessary to examine the sections of the earlier Act of 1902, because if their construction is different from that of the Act of 1923 it is always possible, the words being different, that the later Act is intended to amend the earlier one. This is, of course, not to say that if the later Act is exactly *in pari materia* with the earlier one, the two statutes may not have to be taken and construed together as one system and as explanatory of each other (per Lord Mansfield in *Rex v. Loxdale* (1), *Goldsmiths' Company v. Wyatt* (2)). Nor have I placed reliance on the amending Act of 1927 in construing section 9 of the Act of 1923 ; but I may observe that the draftsman of the Act of 1927 seems to have thought that a certificate as to the population of only a single area was needed, and I cannot help thinking that if the Legislature had considered that in every case there had to be two inquiries and a certificate or certificates as to two increases of population different language would have been used.

For these reasons, my Lords, I think the judgments of Lord Justice Best and Lord Justice Babington, and I will add the doubts expressed by the learned Recorder for Belfast, were correct, and this appeal must be dismissed.

LORD ATKIN.

LORD ATKIN : My Lords, I concur.

LORD RUSSELL OF KILLOWEN.

LORD RUSSELL OF KILLOWEN : My Lords, notwithstanding the division of judicial opinion which has existed in Northern Ireland, I have found the answer to the question in debate to be reasonably free from difficulty. The question is what is the true construction of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, and the answer depends upon the language used in that particular provision,

(1) 1 Burr. 447.

(2) 76 L.J. (K.B.) 166 at page 169.

which should, I think, be considered as it stands, and without reference to the Licensing (Ireland) Act, 1902, or any other alleged legislative ancestor.

I do not agree with the contention of the appellants, which appears in the second reason in their case namely, that "it is not a right method of construction "to use a proviso to control or alter the operative "effect of the words preceding it." That is frequently the very function of a proviso, namely, to include within the scope of the preceding words something which *prima facie* would not fall within it, or to exclude something which *prima facie* would so fall. Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them.

Section 9 (*c*) seems to me a case in which the proviso tells you expressly in what sense you are to understand the preceding words, "an increase of not less than 25 "per cent. of the population according to the last "census." Until the proviso is read it is not clear where the increase is to take place. Must there be a 25 per cent. increase in the population of the whole city or town, or will it suffice if there is a 25 per cent. increase in the population of some defined part of the city or town? The words preceding the proviso would *prima facie* point to the former view. One must, however, read the whole clause before attempting to construe any portion of it; and a perusal of the proviso fixes the meaning of the words which precede it. It tells you where the increase of population has to take place, namely, in the ward or electoral division in which the premises proposed to be licensed are situate. The words, "such increase of population" admit of no doubt. They are equivalent to "the "increase of population above referred to," that is, "an increase of not less than 25 per cent. of the "population according to the last census," and they establish that the population in question is the population of the relevant ward or electoral division.

For these reasons I agree that this appeal fails and should be dismissed with costs.

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I agree, too, that in view of the facts that the present appellants or their solicitors were served with the order of the 25th April, 1938, and with the notice of appeal of the 20th May, 1938, and were ordered to pay the costs of that appeal, they were persons aggrieved by the order appealed from, and that an appeal lay to your Lordships' House.

LORD WRIGHT: My Lords, the respondent, James Kelly, made application to His Honour Judge Thompson, Recorder of Belfast, as the licensing authority for the City of Belfast, that a new licence for certain premises in the Ormeau Ward in the City should be granted to him. The Recorder refused the grant of the licence, on the ground that he was bound to do so under a decision of the High Court of Northern Ireland, *The King* (*Rainey*) *v. The Recorder of Belfast* (1), though he indicated his personal disagreement with the reasoning of that decision. Before the Recorder the appellants appeared as objectors under 3 & 4 William IV., chapter 68, section 4, which gives a right to residents (*inter alios*) in the particular area to appear and object to the grant of a licence. The respondent then applied to the High Court for a conditional order for a writ of certiorari directed to the Recorder to remove the order into the High Court. Notice of this application was served on the appellants. This application was refused by the High Court, but granted by the Court of Appeal, which ordered that unless cause were shown to the contrary within 10 days after the service of the order upon the solicitor for the appellants, the Police, and the Clerk of the Crown and Peace for the County of Antrim, a writ of certiorari should issue to remove into the King's Bench Division the order of the Recorder for the purpose of being quashed, on the ground of error in law. The appellants having filed an affidavit, appeared by counsel in opposition to the granting of the writ, before the King's Bench Division, which discharged the conditional order with costs to be paid by the respondent to the appellants. The respondent then appealed to the

(1) [1938] N.I. 10.

Court of Appeal before whom the appellants appeared in support of the order in their favour, and were represented by counsel. The Court of Appeal by a majority, Lord Chief Justice Andrews dissenting, allowed the appeal, made the conditional order absolute, directed the writ of certiorari to issue to the Recorder to remove his order into the King's Bench Division for the purpose of being quashed, and ordered the appellants to pay the costs of the proceedings. The appellants appeal from this order to this House.

Before dealing with the substance of the appeal, it will be convenient first to dispose of the preliminary objection taken by the respondent, which is that the appeal is not competent. The right of appeal to this House from the Court of Appeal in Northern Ireland in proceedings by way of certiorari depends on section 49 (*a*), (b) of the Government of Ireland Act, 1920, as applied to Northern Ireland under the Irish Free State (Consequential Provisions) Act, 1922, (Session 2), First Schedule, section 6 (3). In effect it is thereby provided that only a "person aggrieved" by the order of the Court of Appeal in the proceedings in certiorari (*inter alia*) can appeal. It has been contended on various grounds that the appellants are not persons aggrieved. It is said that they have no peculiar or individual right or interest or grievance in respect of the order made by the Recorder or the order made by the Court of Appeal in the proceedings by way of certiorari, because they are merely in the position of any other residents in the City of Belfast. It is also said that so far as the order against which they are appealing orders them to pay costs, that does not constitute a grievance within the meaning of the section, that, even if it were, the only appeal which is competent is an appeal limited to the question of costs, and further, that this House will not entertain an appeal solely on a question of costs. In my opinion, all these objections are ill-founded. The proceedings in which the appeal is brought are the proceedings by way of certiorari, not the proceedings before the Licensing Authority. In these latter proceedings, there could be no appeal, as was held in England (and

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the same rule applies in Northern Ireland) in *Boulter v. Kent Justices* (1). But the question is whether the appellants were persons aggrieved under and in respect of the decision in the proceedings by way of certiorari. In order to see if they were persons so aggrieved, it is necessary to consider what their position was. The Court of Appeal, in granting the conditional order for certiorari, had directed that the order was to issue unless within 10 days of service on the appellants, cause was shown to the contrary. The appellants, being duly served, appeared before the King's Bench Division and succeeded in showing cause to the contrary, and were awarded their costs. In appearing in these circumstances, they could not, in my opinion, be regarded as merely officious, quite apart from their right to object in the licensing proceedings under section 4 of 3 & 4 William IV., chapter 68. Notice of appeal was then served upon them through their solicitor. They appeared and were represented by counsel before the Court of Appeal. But the appeal was allowed and they were ordered to pay the costs of the proceedings and the order of the King's Bench Division awarding them costs was set aside. No objection throughout was taken to the appellants taking the steps which they did in the certiorari proceedings. It is not necessary here to decide whether the mere fact they had a statutory right to object in the proceedings before the Licensing Authority would constitute them parties interested in the proceedings by way of certiorari. But they were treated throughout as competent parties in these proceedings, notices were served upon them as being proper parties, orders were made in their favour and against them. It would be strange indeed if in these circumstances they were debarred from seeking to have restored the order made in their favour by the King's Bench Division, or to secure a reversal of the adverse order of the Court of Appeal. It would not, I think, be right to treat the matter simply from the standpoint of costs, but even if it were so treated, I think the appellants should succeed on the preliminary objection. In my

(1) [1897] A.C. 556.

opinion the appellants were clearly aggrieved by being ordered to pay costs, and their right of appeal was complete merely on this limited ground. The section, be it noted, does not expressly specify the extent or nature of the grievance required, or limit in any way the scope of the right of appeal if the party is aggrieved. But if the order as to costs constitutes a sufficient grievance, it is clear that the question as to costs could not be decided without deciding on the merits of the case, and the House could not stultify itself by an inability to give full effect to its decision if it held on the appeal that the decision of the Court of Appeal was wrong. Nor is there any rule of this House that it will not entertain an appeal which goes only to costs. In *Boulter's* case (1), the Quarter Sessions had ordered the appellant to pay the costs of the hearing of the appeal to Quarter Sessions. He had objected before the Justices and the licence had been refused, but on appeal it was granted by Quarter Sessions, before which Court he had not appeared. He applied for certiorari simply and solely in respect of the order to pay costs, and eventually, after failing in the Divisional Court and in the Court of Appeal, succeeded in this House, which held that Quarter Sessions had no power to order costs against Boulter.

Though *Boulter's* case (1) depended on jurisdiction, I think it is an authority that a person ordered to pay costs in a case before licensing Justices in which he is an objector, has sufficient interest to be entitled to apply for certiorari, though, as this House held in *Boulter's* case (1), he was not a party *in judicio* in the licensing proceedings, there being no *lis* or controversy *inter partes*, and no question of a decision for or against him. After Boulter obtained the conditional order for certiorari, and failed in the lower Courts, this House entertained his appeal, though the sole question was the validity of the order for costs. I think that decision sufficiently disposes of the arguments put forward on behalf of the respondent, that an adverse order for costs is not sufficient to constitute the appellants "persons aggrieved" under section 49,

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because I think that if such an order was sufficient to justify an application for an order of certiorari, it is sufficient to justify a right of appeal under section 49. The same authority is sufficient to dispose of the contention that this House is debarred from entertaining an appeal which simply relates to costs, though no doubt in certain cases it may in its discretion refuse to do so. But in the present appeal it is clear that if it is competent at all, it raises questions of principle of considerable difficulty and importance, on which the Courts in Northern Ireland have differed.

There is no direct authority on the words of the Act now in question and I do not find it very helpful to discuss in detail the various authorities under other Acts, in which it has been debated what is the meaning in those Acts of the words " persons aggrieved." Nor does any one of those cases deal with facts like the particular facts of the present case where the appellants appeared before the licensing authority and made an objection which they had a statutory right to make. Having succeeded in that objection, they were then served by order of the Court in the certiorari proceedings, in which they at first succeeded but failed in the Court of Appeal, which refused them an order for costs and instead ordered them to pay costs. The case which is nearest in point appears to me to be *Sevenoaks Urban District Council v. Twynam* (1), in which a Divisional Court held that a ratepayer who had duly exercised a statutory right to object to a proposal made by the Sevenoaks Urban District Council to acquire land under the Public Health Act, 1925, had a right of appeal as a person aggrieved under that statute though he had no personal or peculiar interest or any interest beyond what flows from the fact that he was a ratepayer and a member of the public who had given a notice of objection which he was entitled to give and had failed. I think this decision was right. The facts of the present case are stronger than those in the *Sevenoaks* case (1).

In my opinion the preliminary objection fails, and I proceed to deal with the appeal. This involves the

(1) [1929] 2 K.B. 440.

construction of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, which runs as follows :— "(*c*) Where, owing to an increase of not less than "twenty-five per cent. of the population according to "the last census, there is a growth or an extension "of any city or town, and the licensing authority is "satisfied, after hearing any evidence tendered to it "by any resident or owner of property in such city "or town, that the restrictions in this section on the "granting of licences may be relaxed, the licensing "authority may grant a licence to any applicant "notwithstanding that the same would be otherwise "forbidden by this section: Provided that such "licence shall be granted only for premises situate in "the ward or district electoral division in which such "increase in population has taken place, and in sub-"stitution for at least two existing licences held in "respect of premises situate within the city or town "(as the case may be) comprising such ward or district "electoral division."

With this must be read section 3, sub-section (6) (iv) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, which is in the following terms :— "(iv) The required increase of population shall be "proved by means of a certificate of the Minister of "Home Affairs that he is satisfied that there has been "an increase of not less than twenty-five per cent. "since the census ascertained next before the passing "of the Act of 1923."

The Recorder's order stated as follows, both the facts which he found and his conclusion :— "It appear-"ing that there has been an increase of the population "since the census ascertained next before the passing "of the Licensing Act, 1923, (*a*) of less than 25 per "cent. in the case of the city of Belfast, and (*b*) of "more than 25 per cent. in the case of Ormeau Ward, "in which the premises proposed to be licensed are "situated, and such increase being insufficient in law "to warrant the granting of a certificate for a licence, "refuse the application on that ground."

As already stated, the Recorder, in so finding, followed the decision in *Rainey's* case (1).

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The question, therefore, is whether the "increase "of not less than 25 per cent. of the population" is to be in the city or in the ward or district electoral division or in both. I agree with the opinion of Lords Justices Best and Babington, which was also the opinion of the Recorder apart from the authority of *Rainey's* case (1), that the required increase of not less than 25 per cent. in the population which is intended is an increase in the population of the ward or district electoral division. So far as concerns the city or town itself, the required condition is, in my opinion, that there should have been a growth or extension of the city or town owing to an increase of not less than 25 per cent. in population of a ward or district in which it is sought to secure the new licence. This latter condition was admittedly satisfied in the facts of the present case, and I do not further discuss it.

The difficulty which is undoubtedly involved in construing the section and which led to the conclusion of Lord Chief Justice Andrews and of the King's Bench Division in *Rainey's* case (1), arises from the want of precision in the first part of section 9 (*c*), which does not define what is "the population" intended. If the section stopped before the second part which is introduced by the word "Provided," it might well have been held by way of supplying the want of definition that it was "the population" of the city or town which was intended because nothing else was mentioned in that part of the section. The crucial matter of debate has been whether the question can be so concluded. In my opinion, it can not. The section must be construed as a whole. The second part of the section must be taken into account (whether it is properly called a proviso or not) in order to ascertain the true effect of the first part. If that is done, it follows in my opinion that the want of precision or the ambiguity which there is in the first part, regarding the definition of "the population" is made good by the words in the second part "the ward or district electoral division in "which such increase of population has taken place." The words "such increase" necessarily refer back to

(1) [1938] N.I. 10.

"the increase of not less than 25 per cent. of the "population," and define what is left undefined in the earlier words of the section. The ambiguity is thus cleared up. I question if any doubt on the point would have arisen if the paragraph introduced by "Provided" had appeared simply as a second or supplementary sub-division of section 9 (*c*). The first part, as it stands, is incomplete by itself because it does not state the conditions and limitations which are contemplated as applying to the relaxation of the restrictions on the granting of the licence. The second part or the section condescends to particulars and in doing so defines the precise meaning of the population in regard to which the increase is required. "Such increase in population" must refer back to something which has preceded and that can only be "such increase" as already mentioned and this is now defined. If it merely meant any increase of not less than 25 per cent., the joint effect of the two provisions might be that the required increase must be found both in the city or town and in the ward, or might be that the increase of 25 per cent. in the city which on this construction is referred to in the first part, would have to be found in the ward or district. Either construction would be very difficult as a matter of words. Perhaps the latter, merely as a matter of words, is less difficult, but as a matter of substance it is practically inconceivable. In Belfast there are 15 wards. There were in the city, according to the census of 1911, 386,947 inhabitants, and in 1926, 415,151 inhabitants (these being the relevant dates for comparison). It would indeed be startling if a ward which showed an increase of 25 per cent. on its own population were denied its claim to a further licence, simply because it did not show an increase in its own population amounting to 25 per cent. on the total population of the city at the 1911 census, that is, an increase of more than 96,000 inhabitants. The manifest purpose of the section, which is to prevent an increase in the number of licensed premises, while satisfying the proper requirements of growing districts, is satisfied if the relaxation of the prohibition against

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new licences is based on the expanding population of the ward in question. This would not increase, but in fact decrease the number of actual licences, as two licences must be surrendered from the city or town before the grant of the new licence in the ward in which the increase has taken place.

The contrary construction favoured by Lord Chief Justice Andrews seems to be mainly based on a technical rule said to apply to the construction of a proviso. It is said that where there is a proviso, the former part, which is described as the enacting part, must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section ; the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. But in the present case not only is the first part of the section deficient in express definition, but the second part is complementary and necessary in order to ascertain the full intention of the legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule even in the case of a proviso in the strictest or narrowest sense. Still less, where, as here, the introduction of the second part by the word " provided " is in a strict sense inapt.

I think this construction is also in conformity with the provision in the later Act of 1927 which deals with proof of " the required increase in population," though I do not seek to construe an earlier statute by a subsequent statute. But the later Act seems to contemplate a single increase, not a double increase or two increases in population. A single increase is what, in my opinion, the 1923 Act requires, and indeed is in accordance with what practical common sense would think that the situation required.

I agree with the order of the Court of Appeal, which in my opinion should be affirmed, the appeal being dismissed with costs.

VISCOUNT MAUGHAM: My Lords, I am asked by my noble and learned friend Lord Porter to say that he concurs in the opinions which have been expressed.

Order of the Court of Appeal in Northern Ireland affirmed and appeal dismissed with costs.

Solicitors for appellants: *Russell & Arnholz*, for *Samuel Henry, Belfast.*

Solicitors for respondents: *Grobel, Son & Co.*, for *Joseph Donnelly & Co., Belfast.*

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THE KING (SMALL) v. BLACK (1).

Jan, 18. Feb. 1.

Obstruction of public street—Summary Jurisdiction (Ireland), Act 1851 (14 *&* 15 *Vict., c.* 92), *section* 13 (3)—*Street Trading (Regulation) Act (Northern Ireland),* 1929 (20 *Geo.* 5, *c.* 9)—*Licence to trade on highway "subject to any statutory provision which is in force"—Construction of statute.*

A person trading in the public street in exercise of a right so to do given by a licence granted to him by the local authority under the Street Trading (Regulation) Act, 1929 (20 Geo. 5, c. 9), is not guilty under the Summary Jurisdiction (Ireland) Act, 1851, section 13 (3) of wilful prevention or interruption of the free passage of any person or carriage on the street.

CASE STATED by the County Court Judge of the County of Tyrone for the opinion of the High Court, pursuant to the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, after the hearing of an appeal against an order made at Petty Sessions convicting the defendant on a summons charging him "that on 26th August, 1939, by placing a fowl-house "on High Street, Omagh, he did wilfully prevent or "interrupt the free passage of vehicles contrary to "the statute 14 & 15 Vic., cap. 92," and fining him five shillings.

The following facts were found by the County Court Judge :—On 26th August, 1939, the defendant had a chicken rearer on a wooden platform on wheels on the public road near to his business premises in High Street, Omagh, and the platform prevented the use by the public of the part of the street which it occupied. The defendant held a licence granted by the Omagh Urban District Council to him under the Street Trading (Regulation) Act (Northern Ireland), 1929, on payment of £5. This was a licence to engage in street trading in the Urban District of Omagh in poultry appliances at the place where the alleged obstruction occurred, and was expressed to be subject (1) to the provisions

(1) In the Court of Appeal before Andrews, L.C.J., Babington and Murphy, L.JJ.

of any bye-laws made by the Council under section 6 of the said Act, and (2) to any other statutory provision in force for the time being.

The County Court Judge affirmed the decision of the Petty Sessions Court convicting the defendant, but stated a case for the opinion of the High Court.

Porter, K.C., and *Curran* for the appellant :—

If a trader to whom a licence under the Act has been granted keeps within the terms of the licence, he cannot be prosecuted for obstruction ; if it were otherwise the licence would be a sham. The Act contemplates that a licence may be granted to trade on the highway notwithstanding that such trading may cause some obstruction, because section 2 (2) enacts that a local authority may refuse to grant a licence if the space available in the street is insufficient for trading without causing "*undue*" interference with or inconvenience to the traffic.

In *Summers v. Holborn District Board of Works* (1), Cave, J., says, "the general rule is that when you "have an Act of Parliament enacting particular "provisions, and in a subsequent Act there are pro- "visions which are inconsistent with the provisions "of the first Act, both enactments cannot stand "together. The enactment in the second Act stands "and repeals the enactment in the first Act. Of "course, from the necessity of the case, it is an implied "and not an express repeal."

In *Keep v. Vestry of St. Mary's, Newington ; Austin v. Vestry of St. Mary's, Newington* (2), Lindley, L.J., said : "I agree with the view taken by the Court in *Summers* "*v. Holborn District Board of Works* (1), that these "Acts must not be read in such a way as to render them "illusory and deceptive."

Black, A. G., and *Patton*, for the respondent :—

The Street Trading (Regulation) Act is negative and confers no rights ; it merely gives the local authority power to regulate street trading, and leaves

(1) [1893] 1 Q.B. 612, 618. (2) [1894] 2 Q.B. 524.

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the holder of a licence under the Act open to all the penalties to which he was formerly liable. The powers of regulation conferred by the Act apply to persons who prior to the Act were legally entitled to trade upon the highway either by custom or under rights reserved upon the dedication of the highway. The title of the Act does not suggest that it was an Act to give rights where they did not exist before.

[They also referred to *Elwood v. Bullock* (1), *Attorney-General v. Horner* (2), *Attorney-General v. Horner* (*No.* 2) (3).]

Cur. ad. vult.

BABINGTON, L.J.

Feb. 1.

BABINGTON, L.J., delivered the judgment of the Court as follows:—

The appellant was prosecuted at petty sessions under section 13 (3) of the Summary Jurisdiction Act (Ireland), 1851, for wilfully preventing or interrupting the free passage of vehicles on a public street in Omagh by placing a fowl-house or "fowl-ark" thereon. The act was admitted but justified by the production of a document issued to the appellant's firm by the Urban District Council of Omagh under the Street Trading (Regulation) Act (Northern Ireland), 1929, purporting to be a licence to engage in street trading in the urban district. This licence was issued on the 5th June, 1939, and was to continue in force until the 1st January, 1940. The alleged offence was committed on the 26th August, 1939.

The appellant's counsel did not contest the proposition that the act of the appellant in placing his fowl-house on the highway might have constituted an offence under section 13 of the Summary Jurisdiction Act (Ireland), 1851, if he had not been the holder of a Street Trading Licence (*see R. (Collins) v. Fermanagh J. J.* (4) and *McKee v. McGrath* (5)), but argued that the licence conferred on the appellant the right to engage in street trading from one stall (i.e., the fowl-

(1) 6 Q.B. 383.
(2) 14 Q.B.D. 245.
(3) [1913] 2 Ch. 140.
(4) 14 L.R.Ir. 50.
(5) 30 L.R.Ir. 41.

house) in poultry appliances in the High Street, Omagh, at Mrs. Rutledge's shop which was the place he is alleged to have been obstructing on the 26th August, 1939.

These limitations on the trading permitted are set out in the schedule to the licence which was granted on the condition that the holder would trade solely in the articles or things and in the manner and at the places and times specified in the schedule thereto. The time is not specified in the licence but no argument was based on this omission and it may be treated as immaterial in considering the main question of principle upon which our opinion is sought.

The licence was also granted subject (1) to the provision of any bye-laws made by the Council under section 6 of the Street Trading (Regulation) Act (Northern Ireland), 1929, and (2) to any other statutory provision which is in force for the time being.

We were not referred to any bye-laws made by the Council, and we again assume that there are none affecting the matter to be decided. It was, however, argued by the Attorney-General that the last condition was inserted to make it clear that the licence was not intended to protect the licensee from prosecution under section 13 of the Summary Jurisdiction Act (Ireland), 1851. I will deal with this argument later.

This licence was issued pursuant to section 1 of the Act of 1929, sub-section (1):—

> "On and after the first day of January, 1930, it "shall not be lawful for any person to sell, or expose "or offer for sale, any article or thing from or upon "any vehicle, barrow, cart, stall, or other receptacle "occupying a stationary position at a place in the "carriage-way or footway of any street in an urban "district (other than a county borough) or in a town "not being an urban district but having com- "missioners under the Towns Improvement (Ireland) "Act, 1854 (in this Act referred to as 'the district') "without a licence from the council or commissioners "of the district (in this Act referred to as 'the local "'authority') authorising such person so to do."

Reading this section one would think that the act of

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selling or exposing or offering for sale any article or thing from or upon any vehicle, barrow, cart, stall or other receptacle occupying a stationary position at a place in the carriageway of any street which was or might have been an offence under the Summary Jurisdiction Act as a wilful obstruction of the highway, became a legal act when done under the licence, or to put the proposition in the terms of the section that when the Legislature says "it shall not be lawful" to do certain acts "without a licence" it follows that they become lawful when done by a person fortified by the licence prescribed by the Statute. The Attorney-General, however, would not admit this. He argued that the Statute is negative and confers no rights and that it merely gives the local authority power to regulate street trading, and leaves the holder of a licence under the Act open to all the penalties to which he was formerly liable. We cannot accept this argument or understand how these powers to regulate street trading can co-exist with the liability of the trader to be prosecuted for obstruction under the Summary Jurisdiction Act, 1851, and if we were to accept it the result would be that a licence when granted would only mislead the licensee as Cave, J., points out in *Summers v. Holborn District Board of Works* (1), since the first policeman who happened to pass could prosecute him for wilfully obstructing the highway thereby putting an end to the licence, which is precisely what has happened to the appellant.

If this is the law it would be a sorry position for all licensees and for the local authorities who grant the licences. Messrs. David Black & Co. paid £5 for their licence which authorised them to trade, and are they now to be told that their licence is worthless and a mere invitation to them to commit a criminal offence? We think not.

The Act was passed to regulate street trading. It is common knowledge that this form of trading has heretofore been carried on all over Northern Ireland by persons who were obstructing the highway, only an infinitesimal fraction of whom could show any legal

(1) [1893] 1 Q.B. 612, 620.

right to do so either by custom or reservation or in any other way ; and before the Act of 1929 the local authority, which is also the highway authority, had no power to regulate such trading, otherwise than by instituting proceedings for wilful obstruction which they could do under the Towns Improvement (Ireland) Act, 1854. Similar proceedings could also have been set in motion by the police or any person injured by the obstruction and possibly by a common informer under the Summary Jurisdiction Act, 1851. The local authority had therefore no control over street trading and prosecutions have only been taken in gross cases of obstruction. What powers of regulation are given to them by this Act ? If the Attorney-General's argument is sound, and persons holding a licence from the local authority are liable to be prosecuted for obstruction under the Summary Jurisdiction Act, it is clear that their right to regulate the trading of persons liable to such prosecution is undermined and the Act becomes unworkable. The Attorney-General was obviously impressed by this difficulty and he endeavoured to supply a subject matter on which the Statute could operate and a class of persons to whom an effective licence could be given, by saying that the powers of regulation conferred by the Act could apply to persons who prior to the Act were legally entitled to trade upon the highway either by custom or under a right reserved when the highway was dedicated. We can find nothing to warrant this limited construction of the statute and we have grave doubts as to whether under this statute local authorities can interfere with the rights of persons legally entitled to trade in the streets or in any way curtail their rights without paying compensation which it will be noticed is provided for in the case of interference with market rights by section 10 of the Act. On the Attorney-General's argument, there is therefore no subject matter upon which the statute can operate without coming into conflict with section 13 of the Summary Jurisdiction Act (Ireland), 1851, and we must look for some other construction. The true construction of this Act appears to us to be tolerably clear. The Legislature is not

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dealing with any class of street traders, but, recognising perhaps that street trading within prescribed limits may be necessary and beneficial to the life of the community, has endeavoured to introduce some order into the general body of unauthorised street traders and to put an end to the anomaly that the greater part of such trading was carried on in breach of the law regulating the use of the highway.

In order to carry out these objects the local authority is constituted the licensing authority—and elaborate provisions for the granting of licences by them is provided in section 2—and the applicant must state in his application for a licence the street or streets or area in which he intends to sell or expose or offer his goods for sale.

The form of the licence is to be prescribed by the Ministry of Home Affairs, section 2 (3) specifying (*a*) the streets or area in which *and the position or place in any such street or area* at which the licensee may sell or expose or offer his goods for sale.

The licence in this case prescribes the *position* or *place* in which David Black & Co. may sell or expose or offer their goods for sale to be opposite Mr. Rutledge's shop in High Street, in the town of Omagh, and he is entitled to use it.

The local authority have so authorised him and such user cannot be now an obstruction within section 13 of the Summary Jurisdiction Act (Ireland), 1851, but must be taken to be exempt from its provisions, nor can it be wilful within the terms of that section for the precise act of obstruction has been willed by the local authority and not by the licensee.

This extension of the powers of local authorities empowering them to allocate portions of streets for "*street trading*" under a system of licence does not appear to be inconsistent with the powers they already exercise under our Local Government Acts. The Towns Improvement (Ireland) Act, 1854, and the incorporated sections of the Towns Improvement Clauses Act, 1847, contain elaborate provisions as to the repair of streets "under the management of" (sections 51 and 52 of the Act of 1847) or "vested in"

(section 79 of the Act of 1847) the "*local authority*" as defined by section 1 (1) of the Act we are dealing with, and as to obstructions and nuisances in the streets (sections 70-72 of the Act of 1854), and while carrying out repairs to the streets the local authority may "prevent the passage of carriages and horses "while such works are carried on" (section 79 of the Act of 1847).

Moreover, the fasciculus consisting of sections 70 to 73 of the Act of 1854 is prefaced by the words "with "respect to the Regulation of Towns," which suggests that the objects of that Act are somewhat similar to those of the Act which we are now considering. If therefore Parliament considered it advisable to introduce a co-ordinated system of street trading under licence, there is nothing revolutionary in the fact that the administration of the Act has been entrusted to the local authorities who will, no doubt, carefully consider the question of obstruction to the highway when granting, renewing or revoking licences as they are enjoined to do by section 2, sub-section (2) (*b*).

This disposes of the case and we can find nothing in section 13 which throws any doubt on the construction of the Act which I have outlined. This section is merely a saving clause and ought not to be construed so as to render the Statute inoperative; and though we are satisfied that there are penalties for which the licensee could have been made liable if the Act had not been passed to satisfy the second part of section 13 of the Street Trading Act, other than the one prescribed by section 13 of the Summary Jurisdiction Act (Ireland), 1851 (see the Towns Improvement (Ireland) Act, 1854, and the Acts thereby incorporated), we would be prepared to hold, if necessary, that the non-existence of any such penalty would not be sufficient to compel us to hold that the words "*any penalty*" must include the penalty in section 13 of the Act of 1851 when to so hold would stultify the later Act. Nor does the reservation in the licence itself, making it subject to any other statutory provision which is in force for the time being, preserve the right of prosecution under section 13 of the Summary Jurisdiction

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Act (Ireland), 1851. It was certainly not inserted with this intention for that section and the licence are mutually destructive, and we have little doubt that an exhaustive enquiry would show other statutory provisions relating to trading to which the reservation may possibly apply.

This case bears some resemblance to the case of *Summers v. Holborn District Board of Works* (1), and that case when read along with *Keep v. Vestry of St. Mary's, Newington* (2), where the ratio decidendi in *Summer's* case is disapproved of, shows that in cases of this nature the later Act may impliedly repeal the earlier one, as was suggested in the argument before us, or it may only establish an exception by excluding a certain class of persons from the operation of the earlier Act either wholly or in part and conditionally or unconditionally. In this case it is not necessary to decide whether section 13 of the Act of 1851 is impliedly repealed in so far as it might affect a trader holding a licence from the local authority, or whether on procuring his licence the trader is conditionally excepted from its provisions. It is enough to say that while the trader holds a licence he cannot be prosecuted under the earlier Act ; and in our opinion so long as he holds the licence and acts within the powers which it confers upon him he is conditionally excepted from the provisions of section 13 (3) of the Act of 1851.

Solicitors for the appellant : *King Houston & Black.*
Solicitor for the respondent : *W. H. Fyffe.*

J. McC.

(1) [1893] 1 Q.B. 612. (2) [1894] 2 Q.B. 524.

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Oct. 23. Nov. 2.

Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *cap.* 32), *sec.* 13 (1)—*Widows' Pension—Failure of employer to pay contributions—Widow not entitled to pension—Right of widow to recover from employer—Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 *and* 26 *Geo.* 5, *cap.* 13, *sec.* 21 (1)—*" Cases for the recovery of debts between party and party."*

An employer who has failed or neglected to pay contributions payable by him under the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936, in respect of an " insured man," by reason of which failure or neglect the man's widow is not entitled to a widow's pension under the Act, is liable to pay to the widow the sums to which she would have been entitled under the Act in respect of such pension if the contributions had been duly paid.

The words " between party and party " in section 21, subsection (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, refer to the form of the proceedings, not to the nature of the debt sued for.

CASE STATED by the County Court Judge of the County of Tyrone for the opinion of the High Court, pursuant to the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, after the hearing of an appeal against an order made at Petty Sessions.

At the hearing before the County Court Judge the following facts were admitted :—Rose McAleer owned a farm and had in her employment thereon for a number of years a man named Francis Coyle, who was the complainant's husband. Francis Coyle was an " insured man " under the National Health Insurance Act, 1936, and the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936, but Rose McAleer did not pay the contributions payable by her under those Acts in respect of him. Francis Coyle died on 1st March, 1938, and the complainant thereupon applied for a widow's pension

(1) In the Court of Appeal before Andrews, L.C.J., Babington and Murphy, L.JJ.

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under the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936. Rose McAleer died on 28th May, 1938; probate of her will was granted to the defendants. The Ministry of Labour obtained from the defendants certain contributions in respect of Francis Coyle, but these contributions were insufficient to qualify the complainant for the receipt of such pension. If the statutory contributions had been duly paid the complainant would have been entitled to a pension of ten shillings per week. The complainant brought proceedings at Petty Sessions claiming £26 for loss of pension for one year, and the Court granted a decree for that amount.

The County Court Judge affirmed the decree, but stated a case for the opinion of the High Court.

Warnock, K.C., and *Hanna* for the appellants :—

Neither the National Health Insurance Act, 1936, nor the Widows', Orphans' and Contributory Pensions Act (Northern Ireland), 1936, gives any right to anyone but an employee, or a person claiming through an employee, to sue an employer for loss sustained by reason of the failure of the employer to pay the statutory contributions. The National Health Insurance Act, 1936, section 174, which gives such right to employees and persons claiming through employees, only gives the right to recover the amount of any sickness, disablement, or maternity benefit.

The Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936, section 13, enacts that all statutory provisions relating to the payment and collection of contributions under the National Health Insurance Act, including the provisions with respect to civil proceedings in relation to contributions shall apply to contributions under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, but that section is to be read as relating to the payment and collection of contributions and not as conferring a right of action which is not mentioned in the Act.

The Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, section 21, under which these proceedings were brought, only empowers a court of summary jurisdiction to determine cases for the recovery of debts between party and party; these proceedings are not between party and party; if the respondent has any right she ought to have enforced it by civil bill under the National Health Insurance Act, 1936, section 208 (2).

Black, A.G., and *Sheil* for the respondent :—

The present proceedings are "civil proceedings in "relation to contributions" within the Widows', Orphans' and Old Age Contributory Pensions Act, 1936. That Act is analogous to the Unemployment Insurance Act (Northern Ireland), 1936, the corresponding section of which, section 19, falls under the sub-heading of "Enforcement of Payment of Con- "tributions," and is contained in Part II. of the Act under the heading "Contributions" and not in Part III. which has for its heading "Benefit." See *Halsbury's Laws of England*, Vol. 27, Par. 208.

ANDREWS, L.C.J., delivered the judgment of the Court which was as follows :— ANDREWS, L.C.J.

This is a case stated by His Honour Judge McGonigal pursuant to the provisions of section 26 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. The appellants are the executors of the will of Rose McAleer, who was the employer for a number of years of one Francis Coyle, who died on 1st March, 1938, leaving the respondent, Mary Jane Coyle, his widow. Rose McAleer, who survived Francis Coyle, died on 28th May, 1938. Owing to her failure to pay contributions as provided by the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936 (hereinafter referred to as "the Pensions Act") and the National Health Insurance Act, 1936 (hereinafter referred to as "the Insur- "ance Act"), the respondent was declared by the Ministry of Labour disentitled from receiving the

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widow's pension of ten shillings per week. She, accordingly, brought a process against the respondents, alleging that they were indebted to her in the sum of £26 for loss of her pension occasioned by such default on the part of Rose McAleer, the said sum representing the amount of such pension for the period of fifty-two weeks. The Resident Magistrate granted a decree for the full amount claimed, and this decree was affirmed by the learned County Court Judge who, at the request of the appellants, stated this case for the opinion of the Supreme Court on the points of law raised before him.

The first and principal of these points, as stated by Mr. Warnock, is that there is no provision in the Insurance Act or the Pensions Act which gives a right to the widow of an employee to sue the employer or his executors for loss of widow's pension consequent upon the non-payment of statutory contributions.

The respondent's claim is based upon the provisions of section 13 (1) of the Pensions Act read in conjunction with section 174 of the Insurance Act. By the latter section it was (amongst other things) provided that where an employer has failed or neglected to pay any contribution which under that Act he is liable to pay in respect of any insured person in his employment . . . and by reason thereof the employee or any person claiming through the employee has lost in whole or in part any benefits to which he would have been entitled under the Act, the employee or person so claiming shall be entitled to recover summarily from the employer as a civil debt a sum equal to the amount of any sickness, disablement or maternity benefit which he has lost, and a sum equal to the amount of the expenses which he has incurred by reason of not being entitled to medical benefit.

In citing this section Mr. Warnock, for the appellants, directed our special attention to the fact that the person who suffers the loss and upon whom the right of recovery is conferred must be the employee or a person claiming through him; that the benefit lost must be one to which "he," the employee, was entitled under the Act; and that the benefit must be one or

other of the four classes of benefit mentioned, namely, sickness, disablement, maternity or medical.

We pass now to section 13 of the Pensions Act which provides that the contributions by or in respect of an insured person . . . payable under the Act and under the Insurance Act shall be paid as one contribution under the Insurance Act, and, subject to such modifications and adaptations as might be prescribed, the contributions payable under the Act in respect of a person in an excepted employment, or of a person who has attained the age of sixty-five, shall be paid as if they were contributions under the Insurance Act, and, subject as aforesaid, all statutory provisions relating to the payment and collection of contributions under the Insurance Act including (but without prejudice to the generality of the foregoing enactment) the provisions with respect to offences and civil proceedings in relation to contributions, with respect to priority of the claims for contributions, and with respect to the powers of inspectors, shall have effect accordingly.

The first point which impresses one upon reading this section is the obvious intention of the legislature for purposes within the scope of our present inquiry, to link the two Acts of Parliament together as if they were in fact one, and as if that one Act was the Insurance Act. This is apparent not only from the fact that the contributions under both Acts are made payable as one contribution under the Insurance Act, but from the further fact that certain specified statutory provisions of the Insurance Act are, subject to such modifications and adaptations as might be prescribed, " declared to have effect accordingly."

The most important question to be determined is whether the provisions of section 13 of the Pensions Act are sufficiently wide and comprehensive to embrace section 174 of the Insurance Act so as to make its provisions in regard to civil proceedings by an employee against an employer for non-compliance with that Act applicable to proceedings by a widow against her deceased husband's employer for non-compliance with the provisions of the Pensions Act. If section 13

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of this latter Act merely provided that all statutory provisions relating to the "*payment* and *collection* of "contributions under the Insurance Act shall have "effect accordingly" one could well understand considerable weight being given to the argument that such words were inappropriate and insufficient to include such provisions as those contained in section 174 of the Insurance Act. But, however this may be, all doubt in the matter is in our opinion removed by the more definitive words of section 13 which follow, as such provisions relating to the payment and collection of contributions are declared to include "provisions with respect to offences and civil pro-"ceedings *in relation to* contributions." Now what are "civil proceedings in relation to contributions"? It is to be noted that the words used are not civil proceedings "for the payment and collection" or "for the recovery" of contributions. They are the much more general words "civil proceedings *in relation* "*to* contributions." No words could be wider or more comprehensive than the words "in relation to." Proceedings must clearly be "in relation to" contributions if they are concerned with contributions as their subject matter. So viewed we have no hesitation in saying that the proceedings sanctioned by section 174 of the Insurance Act are "in relation to contribu-"tions." In support of this view the Attorney-General directed our attention to the fact that a corresponding section (section 19) in the contemporaneous social legislation—The Unemployment Insurance Act (N.I.), 1936—is contained in the portion of the Act—sections 18 to 20—which has as a sub-heading the words "Enforcement of Payment of "Contributions." It is also contained in Part II. of the Act under the heading "Contributions," and not in Part III. of the Act which is headed "Benefit."

Again, Part 8 of the Insurance Act which comprises sections 170 to 188 is headed "Legal and Miscellaneous" with a sub-heading for sections 170 to 178 of "Offences, "Legal Proceedings, etc.," while a sub-heading "Miscellaneous" is given to the remaining sections. Our right to refer to these headings and sub-headings

is clearly established by the highest authority. They are to be regarded as parts of the Statute itself and may be read as explaining the sections which immediately follow. Lord Herschell in *Inglis v. Robertson* (1), says : " These headings are not, in my " opinion, mere marginal notes, but the sections in the " group to which they belong must be read in con- " nection with them and interpreted by the light of " them." See also Brett, L.J., in *Reg. v. Local Government Board* (2).

In further support of the argument that section 174 of the Insurance Act is a " contribution " as distinguished from a " benefit " section one naturally looks at its opening words which run :—" Where an em- " ployer has failed or neglected to pay any contribution." Moreover, what is recovered by the civil proceedings is not strictly speaking " benefit " at all—it is " a sum " equal to the amount of . . . benefit which he has " lost." In truth, they are proceedings brought by an employee to obtain redress because his employer's non-compliance with the provisions of the Act in regard to payment of contributions has deprived him of his statutory right to benefit. We are clearly of opinion that such proceedings " relate to," or, in the words of section 13, are " in relation to " contributions, as it is their non-payment which gives rise to the cause of action.

A further point made by Mr. Warnock is that section 174 of the Insurance Act confers a right to relief only where the loss consequent upon the non-payment of contributions relates to sickness, disablement, maternity, or medical benefit which are wholly distinct from the loss of widow's pension. We have some difficulty in appreciating this argument. If it was the intention of the legislature, as we hold that it was, that the legislative machinery of a section of an Act of Parliament relating to certain subject matters should be incorporated with or set up by reference in a subsequent Act of Parliament dealing with another subject matter, then necessarily such provision applies with necessary modifications to the

(1) [1898] A.C. 616, 630. (2) 10 Q.B.D. 309, 321.

K.B.D. (Probate). 1941.

June 6, 13. July 18.

IN THE GOODS OF JOHN DOHERTY, DECEASED.

Probate—Practice—Grant of administration intestate though will in existence—Non-compliance with citation to lodge Letters of Administration—Form of order.

J. D. died leaving a will by which he appointed three executrices of whom M. M. was the survivor. W. D., one of the children of the deceased man, applied for and obtained a grant of Letters of Administration of the estate as on an intestacy. On the application of M. M. a citation was issued commanding W. D. to bring into the Probate Registry the Letters of Administration and to show cause why they should not be revoked; this citation was not obeyed. M. M. then applied for an Order directing W. D. to lodge the Letters of Administration in the Probate Registry for the purpose of having the grant cancelled.

Andrews, L.C.J., made an order directing W. D. to bring in and lodge the Letters of Administration within a specified time and that in default thereof the applicant should be at liberty to apply for an order for the attachment of W. D.

In the Goods of John Healy (1 N.I.J.R. 77) followed.

APPLICATION for an order of attachment for disobedience to a citation to bring Letters of Administration intestate into the Probate Registry, or for an order revoking the grant of Letters of Administration.

The facts are stated in the judgment.

Stewart for the applicant.

There was no appearance for the respondent.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is an application by Margaret McNally, the surviving executrix of an alleged will, dated 2nd June, 1930, of John Doherty, deceased, for an order directing William Archibald Doherty to lodge the Letters of Administration which were granted to him forth of the District Probate Registry at Londonderry, on 26th March, 1934, on the supposition that the said deceased died intestate, for the purpose of having the Grant thereof cancelled.

The deceased in this matter, who died on 25th March, 1933, left three children him surviving, namely,

William Archibald Doherty, Margaret McNally and Mary Ann Doherty, who died on 21st December, 1940.

It is alleged in the affidavits filed in support of this application that the alleged Will of 2nd June, 1930, was drawn for the deceased by one Teady McErlean, and that it was duly executed by the said deceased as a marksman in the presence of the said Teady McErlean and one Agnes R. Lynn, after having been distinctly read over to the deceased who appeared fully to understand it. At the request of the deceased the original will was retained after execution by McErlean, who asserts in his affidavit that he informed William Archibald Doherty both of the existence and of the contents of the will. Notwithstanding this, the latter applied for and obtained the grant of administration intestate, which could only have been made to him on his deposing to the death of the deceased intestate.

By his alleged Will the deceased appointed his daughters Mary Ann Doherty and the applicant, Margaret McNally, to be his executrices, and appointed them also his universal devisees and legatees subject to the payment of three small pecuniary legacies. William Archibald Doherty took no interest whatever in the deceased's property under the alleged Will ; but recently he purported as administrator to sell the deceased's farm to one William Francis Doherty, who has been registered as owner thereof, and who has been duly served with notice of this application.

On 10th March, 1941, a citation was issued, on the application of the present applicant, Margaret McNally, as such executrix, commanding the said William Archibald Doherty to bring into and leave in the Principal Registry the said grant of Letters of Administration and further to show cause why same should not be revoked. This citation, which was duly served on 1st April, has since been disobeyed ; hence the present application.

Various submissions were made to me on the hearing of the application as to the form of order which in the circumstances it would be proper for me to make. One of these submissions was that an order for attach-

K.B.D.
(Matrimonial)
1940.

Feb. 9, 13.

WELLS v. WELLS (1).

Divorce—Desertion without previous cohabitation.

There may be desertion without previous cohabitation.

Husband and wife separated immediately after their marriage and never cohabited. The wife's parents were willing that the spouses should live together in the wife's parents' house where there was sufficient accommodation for them; the wife was anxious that they should do so, and asked the husband to live with her there, but he never agreed to do so, and never did so.

Held, that the husband was guilty of desertion.

WIFE'S petition for divorce on the ground of desertion.
The suit was undefended.
The facts appear in the judgment.

Stewart for the petitioner.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is a wife's undefended petition for divorce grounded on alleged desertion. The parties were married on 1st December, 1931, in Belfast, where they had both previously resided with their respective parents. The wife was at the time of the marriage only fourteen years of age. A son was born to them about six weeks later. After the marriage ceremony the parties immediately returned to their respective parents, and the only time that they ever lived under the same roof was for about a fortnight at the time of the birth of the child which took place in the house of the wife's parents. At the end of this fortnight the husband left the house without giving any intimation of his intention so to do, and never afterwards returned. According to the wife's evidence there had been no domestic trouble or unhappiness. She was always willing and anxious to live with him as his wife, and asked him to remain in the house, but he said he had his mother to support. Her parents were also willing that he and she should remain in their house, in which, she said, there was sufficient accommodation. The wife gave further evidence that

although she never asked her husband to provide a home for her, she had understood that one would be provided. She emphatically denied that they ever agreed either before or after marriage that they should live apart with their parents, but she admitted that seven years had elapsed prior to the institution of proceedings since she had asked him to come to live with her as her husband. She had always had the custody of the child, and her husband had never come to see him or even asked for them, though his parents' house was, relatively speaking, only a short distance away. Prior to the birth of the child he had made his wife an allowance of 15*s.* 0*d.* a week, which was increased to 30*s.* 0*d.* during the fortnight he was in residence. Payments subsequently ceased, a maintenance order for payment of 10*s.* 0*d.* weekly was obtained, but these payments were subsequently discontinued.

It is clear that there was no cohabitation between the parties subsequent to their marriage, but in my opinion this is not conclusive against the establishment of desertion. It is true that *Fitzgerald v. Fitzgerald* (1), has been frequently cited as authority to the contrary by reason of the dictum of Lord Penzance (p. 697) that "desertion means abandonment and implies an active "withdrawal from a cohabitation that exists." It is sometimes said that the decision of the same learned judge in *Buckmaster v. Buckmaster* (2), is to the like effect. But in my opinion these cases were decided on their special facts, and must not be taken as establishing any general proposition of the character indicated. Thus, in the former case the act of separation was that of the wife, who was the petitioner. It was she who withdrew herself from the common home and cohabitation ; and, though strenuously pressed to resume it, she persistently refused, and never desired such resumption. Again, in the latter case the petitioner wife bargained that in consideration of the sum of £100 she would not molest her husband any more. In such circumstances it was very properly held that the failure of the husband subsequently to cohabit with his wife or to offer her a home did not

(1) L.R. 1 P. & D. 694. (2) L.R. 1 P. & D. 713.

Assize Court, 1942.

Jan. 30.
Feb. 5.

DEMPSEY, APPLICANT,

LONDONDERRY CORPORATION, RESPONDENTS.

Criminal Injury—Compensation for murder of a police constable—"In the execution of his duty"—Criminal Injuries (Ireland) Act, 1919 (9 *Geo.* 5, *c.* 14), *sec.* 1, ***sub-sec.*** 1 (*a*).

In a claim for compensation under the Criminal Injuries Acts and the Criminal Injuries (Ireland) Act, 1919, for the murder of a police constable in the execution of his duty, it is not necessary to prove that the murder was committed on account of his being acting or having acted as a police constable.

APPEAL to the Judge of Assize against a decree made by the Recorder of Londonderry awarding compensation for the murder of a police constable, the husband of the applicant, in the execution of his duty.

Chambers, *K.C.*, and *McCall* (for *Nicholson* on war service) for the applicant.

Warnock, *K.C.*, and *McVeigh* for the respondents.

The facts appear in the judgment.

MURPHY, L.J.

MURPHY, L.J. : This is an application for compensation by Winifred Dempsey under section 1 (1) (*a*) of the Criminal Injuries (Ireland) Act, 1919, for the alleged murder of her husband, Head Constable Dempsey.

The learned Recorder of Londonderry awarded compensation (the amount awarded by him is not in dispute), and the Corporation of Londonderry have appealed against this award.

I heard the evidence of the several witnesses at the Assizes in Londonderry, and at the request of Mr. Warnock, to which Mr. Chambers, on behalf of the applicant, agreed, I adjourned the case for legal argument in Belfast.

Before the case was opened in Londonderry, Mr. Warnock informed me that he would apply for case stated, and he renewed this application at the close of his argument in Belfast.

From the evidence it appeared that Head Constable Dempsey had become Senior Head Constable in Londonderry on the retirement of Head Constable Thomas Hueston, on the 31st May, 1940. It was part of the duties of Head Constable Dempsey to visit the constables on the various points throughout the city, and as District Inspector Stratford told me, there were no defined hours for such visits. Constable Corr had been put on protection duty at the Port of Londonderry at his own request by Head Constable Hueston.

I find on the evidence that on the night of the 8th June, 1940, Head Constable Dempsey in the execution of his duty had visited Constable Corr about 9-50 p.m. in the Belfast Steamship Company's shed on the quayside. What then happened was described by Mr. David McLaren :—

David McLaren examined: "Senior Inspector "employed by Ministry of Agriculture in the Port "of Derry in June, 1940. I recall the 8th June, "1940. About 9-50 I was in the Inspection Office "in which I am employed on the Quay and I came "out of it. I went straight into the Belfast S.S. "Company's shed, where I saw Head Constable "Dempsey and Constable Corr in conversation—it "appeared to be friendly. I didn't overhear what "they said. There was a motor launch in front "of the Head Constable and Constable Corr. Head "Constable Dempsey appeared to be pointing to "the motor launch in the course of the conversation. "when all of a sudden Head Constable Dempsey "turned and left in a hurry, walking fast as if to go "off the Quay through the shed. In a matter of "seconds Constable Corr drew his revolver and shot "Head Constable Dempsey, who was at that time "about eight paces from him. Head Constable "Dempsey, after being shot, put his hands above "his head, ran a few paces and then fell to the

Ch.D.
1940.
Feb. 19, 27.

In re LESTER.
McCRACKEN v. LAW (1).

Will—Charity—Gift to "the Theosophical Society of Belfast"—No such Society—Objects of Theosophical Society—Whether gift for public benefit—Question for Court—Validity—Gift to the several members of Belfast Lodges of Theosophical Society in Ireland.

By her will a testatrix directed her estate, which consisted of realty and personalty, to be realised and converted into money and out of the proceeds she bequeathed, among other legacies, to "the "Theosophical Society of Belfast five hundred pounds." The residue was bequeathed to certain of the pecuniary legatees, including "the Theosophical Society of Belfast," in proportion to the amounts of their pecuniary legacies. There existed in Belfast three Lodges of the Theosophical Society in Ireland, which is constituted under the Rules of the Theosophical Society, a world-wide organisation, incorporated and having its headquarters in Madras. The objects of the Society as set out in the Memorandum of Association are :— (1) to form a nucleus of the Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour; (2) to encourage the study of Comparative Religion, Philosophy and Science; (3) to investigate the unexplained laws of Nature; (4) the purchase, acquisition, holding, management, etc., of funds and property used for the above objects. There was no body properly described as "the Theosophical Society of Belfast." Though the Belfast Lodges were distinct, they met together as one body, elected office-bearers in common, had one established meeting-place, the same minute books, one set of rules and one banking account. The records were such that the precise membership of the Lodges at the date of the death of the testatrix could be ascertained. The testatrix died within three months after the execution of the will.

Held—

(1) That the question whether a gift is for the public benefit is a question to be answered by the Court.

(2) That the objects of the Theosophical Society are not exclusively charitable.

(3) That the legacies were valid gifts to the several persons comprising the Lodges in Belfast of the Theosophical Society in Ireland at the date of the death of the testatrix.

(1) In the Chancery Division before Megaw, J.

ORIGINATING SUMMONS.

The facts are set out in the judgment.

McCracken, for the plaintiff, the executrix of the will of Sara Lester.

Porter, K.C., for the defendant, Margaret Law, one of the next-of-kin, and co-heiresses of the testatrix.

The gift is void for uncertainty. There is no "Theosophical Society of Belfast." The Theosophical Society is a world-wide organisation with national branches, each of which might be described as a Theosophical Society. The Theosophical Society in Ireland is an example. If the testator had given a legacy to "the Methodist Church of Belfast," could such a legacy be given to any particular Methodist Church? This ought not to be construed as an absolute gift to the members of the three Lodges in Belfast, assuming that these Lodges are meant by the words used, because the Society so intended to benefit is a charity. *Bowman v. Secular Society, Ltd.* (1). The gift ought to be applied for the charitable purposes set out in the Memorandum of Association. But if the gift is charitable it is void so far as it would be payable out of land by reason of the provisions of 7 & 8 Vict., c. 97, section 16, as the testatrix had made her will less than three months before her death.

Beattie, K.C., for the defendants, Elizabeth Mary Chase and Sara Napton, who were appointed by the Court to represent the Belfast Lodges of the Theosophical Society.

This is a clear gift to the members of the Society, whether its objects are charitable or not. The affidavits show that there is a body known as "the Theosophical "Society of Belfast." There are three Lodges in Belfast, but they meet as one body, with one set of officers and one bank account. This bequest is

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similar to the bequest in *Re Turkington* (1), where the bequest was to a masonic lodge. I also rely on *In re Clarke* (2), in which there was a bequest to the committee of a corps of commissionaires, and the cases therein reviewed. *In re Wilkinson's Trusts* (3), where there was a bequest to the superioress of a Convent of Mercy, is also in my favour.

Black, A.-G., (with him *Dougherty*) :—

The authorities of most assistance in determining that matter are *In re Cranston* (4), especially the judgment of Fitzgibbon, L.J., and *In re Hummeltenberg* (5).

Cur. adv. vult.

MEGAW, J.

Feb. 27.

MEGAW, J. : By her will, dated the 7th December, 1938, Sarah A. Lester appointed the plaintiff, Maurice L. McCracken, her executor and among other legacies made a disposition in the terms following :—" I give " to the Theosophical Society of Belfast £500."

Her will included a residuary gift to the legatees in her will, excepting the Royal Victoria Hospital, Belfast, proportionate to the amount of their legacies.

She was possessed of real and personal estate amounting in value to nearly £8,000, and if the gift to the Theosophical Society was good both as to realty and personalty the value of it is some £1,000. Sara A. Lester died on the 10th December, 1938, and probate was granted to the plaintiff on the 30th January, 1939.

By the present summons the plaintiff asks for the determination of the Court as to whether the legacy of £500 and the residuary legacy are valid gifts ; and as to who are the persons who can properly receive the benefit of the legacies ; and a question is also put whether the legacies are valid charitable bequests.

The relevant facts affecting the points to be decided are as follows :—

(1) [1937] 4 All E. R. 501.
(2) [1901] 2 Ch. 110.
(3) 19 L.R.Ir. 531.
(4) [1898] 1 I.R. 431.
(5) [1923] 1 Ch. 237.

The Theosophical Society was founded on the 17th November, 1875, at New York, the founders being Madame H. Blavatsky and Colonel H. S. Olcott. Later this Society would appear to have transferred its centre of activities to India and it was incorporated on the 3rd April, 1905, in Madras, its headquarters being established at Adyar, Madras. The objects of the Society are set out in its Memorandum of Association as :—

(1) To form a nucleus of the Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour.

(2) To encourage the study of Comparative Religion, Philosophy and Science.

(3) To investigate unexplained laws of Nature and the powers latent in man.

(*a*) The holding and management of all funds used for the above objects.

(*b*) The purchase or acquisition on lease or in exchange or on hire or by gift or otherwise of any real or personal property, and any rights or privileges necessary or convenient for the purposes of the Society.

(*c*) The sale, improvement, management, and development of all or any part of the property of the Society.

(*d*) The doing of all such things as are incidental or conducive to the attainment of the above objects or any of them, including the founding and maintenance of a library or libraries.

The rules of the Society were filed with the Memorandum.

The Theosophical Society so incorporated is frequently referred to in the documents before me as "the parent Society," and this name may conveniently be adopted to describe it when there is risk of ambiguity. It would appear from the rules that the "Lodge" is the smallest unit for the grouping of individual members of the Society, and that "National "Societies," may be formed by the President upon the application of seven or more chartered Lodges. At

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present the organization consists of the three categories in a descending scale :—

(1) The Parent Society ;
(2) National Societies ; and
(3) Lodges.

At present there are in all forty-three National Societies of the parent Society, including the Theosophical Society in Ireland which has its headquarters in Dublin. This National Society was chartered by the parent Society on the 25th August, 1919. Previous to this, however, on 5th May, 1910, a Belfast Lodge of the parent Society was instituted by a sealed Charter in the following terms :—

" (Founded in New York, 17th November, 1875.)

" THE THEOSOPHICAL SOCIETY AND UNIVERSAL BROTHERHOOD.

" TO ALL TO WHOM THESE PRESENTS MAY COME " GREETING : KNOW YE that it being expedient that " a Lodge of our said Society shall be established at " Ireland in the City of Belfast, and an application " having been made to that effect and approved, Now " THEREFORE, I, the undersigned, President, for and " on behalf of the General Council and by virtue of the " authority of the Society, DO HEREBY GIVE to Joseph " Cardwell, Phyrza Cardwell, J. A. Palmer, H. Purdy, " O. Gregson, Harriett Worth and W. M. Roberts and " their associates full power to organize a Lodge of the " Theosophical Society at the aforesaid place, the same " to be known as the Belfast Lodge of the Theosophical " Society and to be subject to the jurisdiction of the " Parent Society.

" ANNIE BESANT, President."

On the 20th February, 1913, in similar manner, a Charter was given to establish another Lodge, to be known as the " Lotus " Lodge. It is to be observed that the Rev. J. Barron who has made an affidavit in this application was specified in this Charter as one of the organisers of this Lodge.

On the 29th April, 1930, another Lodge was instituted in Belfast to be known as the " Erin " Lodge, but this

Lodge was directed to be subject "to the jurisdiction "of the Theosophical Society in Ireland."

The Charters of the 5th May, 1910, and of the 20th February, 1913, were made in accordance with Rule 32 of the parent Society, as no National Society had been formed in Ireland at the dates of these Charters.

At present there are these three Lodges in Belfast connected with the parent Society, and, though one is known as the Belfast Lodge of the Theosophical Society in Ireland, there is no body properly described as the Theosophical Society of Belfast. The declared objects of the parent Society, the National Society in Ireland, and the three Belfast Lodges are all identical in terms. The three Lodges in Belfast undoubtedly work together, their objects are the same, and, through the National Society in Ireland, they are all ultimately under the jurisdiction of the parent Society.

The Belfast Lodges are still distinct, and it is to be observed that under Rule 37 of the parent Society each Lodge has power of making its own rules, provided they do not conflict with the rules of the Theosophical Society. In fact, however, the individuals composing these Lodges at the present time all meet together as one body, and elect office-bearers in common, and have one established meeting place, and the same minute books which have, for some years past, contained the record of their combined meetings. There is one printed copy of the rules which are under the heading: "The Combined Belfast Lodges of the Theosophical "Society"; there is one banking account entitled: "Belfast Banking Company Limited in account with "The Theosophical Society"; the members of the cult are all assigned to different Lodges, and there is not in fact any part of the organization formally described as "The Theosophical Society of Belfast," though in the Rev. J. Barron's affidavit he assumes that there is such a Society. While the minute books show that the meetings of the Lodges in Belfast have been meetings of the combined Lodges, they everywhere restrict the use of the word "Society" to the Theosophical Society in Ireland, and in the rules brought to my notice the word "Society" is never used except

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in reference to National Society or Parent Society. The Lodges always are particularly referred to as "Lodges."

The combination of Lodges such as has occurred in Belfast is recognised by the National Society of Ireland as Rule 6 of the rules of the National Society of Ireland is in the following terms: "Lodges may form themselves into a group or groups for the better management of their affairs."

In the minutes of the combined Belfast Lodges of the 22nd June, 1936, there is mention of persons attending to discuss the amalgamation of the Erin and Belfast Lodges, and it is stated that "after considerable discussion with reference to the amalgamation of Erin, Belfast and Lotus Lodges, it was decided to postpone the final decision until a later date when the opinion of other members of Erin Lodge could be called for." Nothing seems to have been done in regard to this, as the minutes generally state that a "committee meeting of the Belfast, Lotus and Erin Lodges of the Theosophical Society in Ireland was held," and, in one case, the minutes refer to the testatrix's legacy as being "left exclusively to the "Belfast Lodges."

It is perhaps most relevant to consider the position of affairs of these Lodges in December, 1938, the date of Mrs. Lester's will. The minute book shows that the annual general meeting of the Belfast, Lotus and Erin Lodges was held in the Lodge Room, 39J High Street, Belfast, on the 5th December, 1938, that the Rev. J. Barron acted as chairman, and that fourteen members and one associate were present. I may observe that I have nothing before me to establish what was the exact position of an "associate," but I should gather that an associate was a sort of acolyte in course of training for full membership. The reports being read at the meeting, officers for 1939 were elected, fourteen being elected apparently for the joint Lodges, but the minutes also show that executive officers were elected for the Lodges separately. It does not appear how many members and associates were on the rolls at that date. The minutes of the 2nd January, 1939, mention the

resignation of five members and that the resignation of one of them, who was a member of committee, was accepted. The minutes of the 6th February, 1939, have also a reference to the legacy. On the 6th March resignations of two members were received and accepted. On the 3rd April another resignation was accepted. The minutes of the general meeting for 1939, which was held on the 10th December, 1939—it is described as the annual general meeting of the Belfast, Lotus and Erin Lodges—among other things set out that the session closed with a membership of thirty and five associates, and state that the Lodges were making good progress under adverse conditions, and reference was made to the loss of one of the most important members who had left for America, and to another enthusiastic worker who had gone to live in Dublin. It is recorded that the Belfast Lodge had sixteen members, the Lotus Lodge, seven, and the Erin Lodge, seven, and that the associates numbered five. Officers numbering seventeen were chosen, but some of these were for separate Lodges as well as for the combination of Lodges. I have gone into these particulars as they show the fluctuating character of the comparatively small membership; and though it is clear that the membership to-day has considerably changed in personages from what it was in December, 1938, the precision of the records shows that there would not be any serious difficulty in ascertaining the composition of the Lodges separately or combined on the 10th December, 1938, the date of the death of the testatrix. This would differentiate the case from *In re Thackrah* (1), the Oxford Group case, in which Bennett, J., gave as one of his reasons for deciding, as he did, that the gift to the Oxford Group was invalid, the uncertainty of the objects of the gift.

From the affidavit of the Rev. John Barron, clergyman of the Non-Subscribing Presbyterian Church in Ireland (who, as I have stated, was mentioned in one of the Charters given by Mrs. Annie Besant, and seems to have been for some years an Honorary Vice-President of the combined Lodges), it appears

(1) [1939] W.N. 113.

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that the testatrix was a member of the Belfast Lodge for several years and took a keen interest in its welfare, but did not hold any executive position. Accordingly, she must have been acquainted with the system adopted by the various Lodges and the combination of their activities, which I have already stated, at the time when she came to make her will. I can understand that Mrs. Lester did not always appreciate the legal distinctions that might arise in the use of the words "Society" and "Lodge." In the circumstances I have come to the conclusion that when she used the word "Society" in the will she did so in a popular, non-technical sense, regarding the combined Lodges in Belfast, meeting as they did, as "The Theosophical "Society of Belfast," and, at most, that the use of the term is a misdescription. I have no doubt that she did not refer to the Belfast Lodge merely, but to the associated group of persons forming the Theosophical Lodges in the Belfast District, perhaps not appreciating the legal position that these bodies were merely lodges of the Theosophical National Society in Ireland, and I am of opinion that she meant her gift to benefit these lodges as a whole, and that she intended her legacies to be devoted to the furtherance of what I may term as the theosophical cause. Having come to this conclusion, I cannot think that the somewhat inaccurate description affects the validity of the gift.

Now comes the question as to whether a theosophical society or organization, having the objects set out in their constitution, is a charity within the scope of the legal authorities affecting charitable gifts. Though the parent Society has been in existence since 1875 there does not seem to have been any judicial pronouncement in regard to this. I should think that some of the objects of the Society and its subordinate organisations would conform to the requisites of a charity as interpreted by law, but I am of opinion that, while others of the objects may be laudable and beneficent, they do not fall under the definition of "charity."

Mr. Porter, for the next-of-kin, while contending that the gift was not a gift to the members of the theosophical organisation, and that, in any event, it

was too vague or uncertain as to the object intended to be benefited, argued as an alternative that the gift was a charitable gift within the legal conception of charitable trusts. Mr. Porter's interest in assuming this position was based on the fact that if the gift should be found to be a charitable gift, as the will had been executed less than three months before the death of the testatrix, the legacies would have failed in so far as they were payable out of land, and land formed a considerable part of the estate of the testatrix. This is under 7 & 8 Vict., c. 97, s. 16. He referred me to *Bowman v. Secular Society, Ltd.* (1).

I have already mentioned the declared objects of the Society. Now it may be observed here that there is no declaration of trust, nor is there anything suggestive of a perpetuity. The gift is an immediate gift "to the "Theosophical Society of Belfast," which is neither an unlawful nor corporate institution. The fact that it is not a corporate body distinguishes it from Bowman's case, and Bowman's case was argued on the question of illegality of the objects of the defendant Secular Society, and had nothing to do with the question of the objects being charitable.

If the words read by the Attorney-General from Fitzgibbon, L.J.'s judgment in *In re Cranston* (2) were good law I should be compelled to hold on the opinion I have formed as to the testatrix's intention that the gift was a charitable gift. After referring to the *locus classicus*, Lord Macnaghten's speech in *Commissioners of Income Tax v. Pemsel* (3), Fitzgibbon, L.J., goes on to say (p. 446):—

"The essential attributes of a legal charity are, in "my opinion, that it shall be *unselfish*, *i.e.*, for the "benefit of other persons than the donor—that it "shall be *public*, *i.e.*, that those to be benefited shall "form a class worthy, in numbers or importance, of "consideration as a public object of generosity, and "that it shall be *philanthropic* or *benevolent*—*i.e.*, "dictated by a desire to do good. We must "remember, in cases of the fourth category, that

(1) [1917] A.C. 406.
(2) [1898] 1 I.R. 431.
(3) [1891] A.C. 531.

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"these conditions have been held to be satisfied, "in cases of the second and third, by gifts for the "benefit of very small sects and sections. Under "those circumstances, being bound to clear our "minds of the idea of *misericordia*, I can not reconcile "the cases by anything short of adopting the "principle that any gift which proceeds from a "philanthropic or benevolent motive, and which is "intended to benefit an appreciably important "class of our fellow-creatures (including, under "decided cases, animals), and which will confer the "supposed benefit without contravening law or "morals, will be 'charitable.' Chitty, L.J., rightly "points out that benevolence or philanthropy alone "will not suffice, because there charity, like faith, is "dead, being "without works,' and there are plenty "of philanthropic and benevolent people who stop "at words, or at ideas, and to be 'charitable' they "must *do* something or *give* something for the "benefit of others.

"Having got thus far—What is the tribunal "which is to decide whether the object is a beneficent "one ? It cannot be the individual mind of a Judge, "for he may disagree, *toto caelo*, from the testator "as to what is or is not beneficial. On the other "hand, it cannot be the *vox populi*, for charities "have been upheld for the benefit of insignficant "sects, and of peculiar people. It occurs to me "that the answer must be—that the benefit must "be one which the *founder* believes to be of public "advantage, and his belief must be at least rational, "and not contrary either to the general law of the "land, or to the principles of morality. A gift of "such a character, dictated by benevolence, believed "to be beneficent, devoted to an appreciably "important object, and neither *contra bonos mores* nor "*contra legem*, will, in my opinion, be charitable in "the eye of the law, as settled by decisions which "bind us. It is not for us to say that these have "gone too far."

Now, some of the objects of the Theosophical Society could only be held charitable if they were for the public benefit.

Particularly striking in Fitzgibbon, L.J.'s judgment is the passage about the tribunal which should decide whether a gift was or was not for the benefit of the public. The question for the Court, if this were law, would be merely, did the testator believe that the gift was for the public advantage? I do not think that this passage is more than an *obiter dictum*. Holmes, L.J., in a dissenting judgment, took a different view on this point, and his view has met with approval in subsequent cases, and later decisions, including those of the highest tribunal, have proceeded on an entirely different principle. The Attorney-General referred me to *In re Hummeltenberg* (1), where Russell, J., though in a Court of first instance, said at p. 242:—"It was "contended that the Court was not the tribunal to "determine whether a gift or trust was or was not a "gift or a trust for the benefit of the public. It was "said that the only judge of this was the donor of the "gift or the creator of the trust. For this view reliance "was placed on the views expressed by the Master of "the Rolls and by some members of the Court of "Appeal in Ireland in the case of *In re Cranston* (2). "Reliance was also placed on a sentence in the judg-"ment of Chitty, J., in *In re Foveaux* (3).

"So far as the views so expressed declare that the "personal or private opinion of the judge is immaterial, "I agree; but so far as they lay down or suggest that "the donor of the gift or the creator of the trust is to "determine whether the purpose is beneficial to the "public, I respectfully disagree. If a testator by "stating or indicating his view that a trust is beneficial "to the public can establish that fact beyond question, "trusts might be established in perpetuity for the "promotion of all kinds of fantastic (though not "unlawful) objects, of which the training of poodles "to dance might be a mild example.

"In my opinion the question whether a gift is or "may be operative for the public benefit is a question "to be answered by the Court by forming an opinion "upon the evidence before it."

(1) [1923] 1 Ch. 237.
(2) [1898] 1 I.R. 431, 446.
(3) [1895] 2 Ch. 501.

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These cases were discussed by Lord Hanworth, M.R., in the English Court of Appeal in *In re Grove-Grady* (1), at p. 572:—"Lindley, L.J., treats a philanthropic "purpose as one which indicated goodwill to mankind "in general, and such purposes may be outside the "construction which the Court puts upon charities. "Who is to decide these questions? I agree with "Holmes, L.J., that the answer does not depend upon "the view entertained by any individual—'either by "'the judge who is to decide the question, or by the "'person who makes the gift': *In re Cranston* (2). "The test is to be applied from evidence of the benefit "to be derived by the public or a considerable section "of it; though a wide divergence of opinion may exist "as to the expediency, or utility of what is accepted "generally as beneficial. The Court may decide "whether benefit to the community is established. "In my judgment, Russell, J., as he then was, correctly "states the proposition: 'The question whether a gift "'is or may be operative for the public benefit is a "'question to be answered by the Court by forming "'an opinion upon the evidence before it': *In re* "*Hummeltenberg* (3)."

The judgments in this case seem to me to cover all the points involved in the case before me, and they certainly lend no support to the statement of Fitzgibbon, L.J., as regards the person to decide as to the quality of charitableness in a gift. Russell, L.J., goes so far as to throw serious doubt on such decisions as *In re Cranston* (2), as regards dispositions in favour of animals and anti-vivisectionist societies. Moreover, in case after case, it has been decided that a gift for a benevolent purpose, merely, does not constitute a charitable gift. Lord Macnaghten's statement of the law in the Privy Council in the case of *Dunne v. Byrne* (4) does not proceed on the idea that the opinion of the donor is the determining factor; and this is specially interesting, seeing that it was from Lord Macnaghten's definition of charitable objects that Fitzgibbon, L.J., extracted his judgment in the case of *In re Cranston* (2).

(1) [1929] 1 Ch. 557.
(2) [1898] 1 I.R. 431, 455.
(3) [1923] 1 Ch. 237, 242.
(4) [1912] A.C. 407.

In *Dunne v. Byrne* (1), a Roman Catholic clergyman in Queensland by his will gave his residuary estate "to the Roman Catholic Archbishop of Brisbane and "his successors to be used and expended wholly or "in part as such Archbishop may judge most conducive "to the good of religion in this diocese." Could there be any doubt that this testator's opinion was that this gift was for the public benefit? Lord Macnaghten, however, held that the gift was not charitable, and his advice to the Crown in that case is really an overwhelming refutation of the argument that the gift in this case is a charitable gift.

In my opinion it has now been well settled that the law as to the tribunal to determine the question whether the gift is for the public benefit is to be found in Russell, J.'s, words in *In re Hummeltenberg* (2). The case has been approved in *In re Grove-Grady* (3), and it is acted upon in the latest decision of the House of Lords in *Farley v. Westminster Bank* (4), in which Lord Atkin's speech cites with approval Lord Macnaghten's opinion in the judgment of the Privy Council in *Dunne v. Byrne* (1), and refers to it being essential to a charitable trust that it should be such that a Court of Equity could carry it into execution. It is interesting to notice that Lord Russell was party to the three judgments in different judicial offices, as a Judge of first instance, as a Lord Justice of Appeal, and as a Law Lord.

There are certainly some of the objects of the Theosophical Society which a Court of Equity would be much embarrassed in putting into execution or controlling, and, in my opinion, some of the objects of the Society do not fall within the definition of charitable legacies in the sense which courts of law give to the term.

I must now consider the remaining question, whether the gift is a gift to the persons constituting the Society as I have found it to be—a Society consisting of the three Lodges.

(1) [1912] A.C. 407.
(2) [1923] 1 Ch. 237, 242.
(3) [1929] 1 Ch. 557.
(4) [1939] A.C. 430.

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In re Lester. McCracken v. Law.

Megaw, J.

In the light of the decisions of *In re Smith, Johnson v. Bright-Smith* (1), and its approval by two of the Law Lords in *Bourne v. Keane* (2), I do not find much hesitation in coming to the conclusion that it is such a valid gift.

In *In re Smith* (1), there was a gift of residue in trust for "the society or institution known as Franciscan "Friars of Clevedon in the County of Somerset "absolutely." This was held by Joyce, J., following a series of cases after *Cocks v. Manners* (3) (many of them being Irish), which, as may be supposed, pointed different ways, to be a gift to the several members of the Community of Franciscans at Clevedon at the date of the testator's death. Of course, many of the decisions had been confused by the question of illegality of the institution being involved, a question which does not arise here.

In *Bourne v. Keane* (2), it appears that there was a simple legacy of £200 to the Jesuit Fathers in Farm Street, as well as a subsequent legacy of the residue to the same legatees for masses. The speeches of the Lords are almost entirely directed to the question of masses being a charitable gift, and there does not seem to be any actual pronouncement in regard to the precise beneficial destination of the gift to the Jesuit Fathers, but there are two speeches which have an important bearing on this point.

Lord Buckmaster, at p. 874, says :—"The Jesuit "Fathers at Farm Street are not a corporation, and "the gift to them cannot be regarded as a gift to a "corporate body. It is in fact a gift to a group "of men, members of a particular community resident "at a named place, but the gift is to them individually. "See *Cocks v. Manners* (3) : *In re Smith* (1)." And Lord Parmoor says at p. 916, "In my opinion the "judgments of Wickens, V.-C., in *Cocks v. Manners* (3), "and of Joyce, J., in *In re Smith* (1), should be "followed." It seems to me, therefore, that *In re Smith* (1) has been approved and that I must follow it.

The other contention of Mr. Porter was that the

(1) [1914] 1 Ch. 937.
(2) [1919] A.C. 815.
(3) L.R. 12 Eq. 574.

term "Theosophical Society of Belfast" was too vague and uncertain. I have already expressed my opinion that in the circumstances of the present case the persons included in the term are easily ascertainable. I can see some question arising from the position of "Associates," but I do not regard that as insuperable and I think that a declaration should be made that the gift is a valid gift to the persons comprising the three Lodges.

Making the requisite adaptation of the closing words of Joyce, J., in *In re Smith* (1), my conclusion is that it follows that the legacies in question here are gifts to the several persons composing the Belfast, Lotus and Erin Lodges of the Theosophical Society in Ireland at the date of the testatrix's death.

Accordingly, I hold that the gifts of a legacy of £500 and the residuary legacy to the Theosophical Society of Belfast are good and valid bequests, and that the monies representing the amount of those legacies is payable to the persons composing the three Lodges known as the Belfast, Lotus and Erin Lodges of the Theosophical Society in Ireland at the time of the death of the said testatrix.

Solicitors for the plaintiff: *G. McCracken & Co.*

Solicitors for the defendant Margaret Law: *W. G. Wilson & Sons.*

Solicitor for the defendants Elizabeth M. Chase and Sara Napton: *A. K. Steele.*

M. W. G.

(1) [1914] 1 Ch. 937.

K.B.D. 1940.

Jan. 22.
Feb. 13.

THE KING (KEENAN) v. THE COUNTY COURT JUDGE AND CHAIRMAN OF QUARTER SESSIONS FOR TYRONE (1).

Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), section 24 (1)—"Cases of a civil "nature"—Breach of Statutory Regulations as to turbary—Cutting turf so as to prevent future reclamation of bog—Neglect to provide drainage of water from bog—Appeal to Quarter Sessions.

A. was authorized by Regulations made under the Irish Land Act, 1903 (3 Edw. 7, c. 37), section 21, to cut turf in a certain bog on the lands of F.; by those Regulations he was prohibited from cutting the turf in such manner as to prevent the future reclamation of the bog, and was required to provide reasonable drainage for water to the natural outlet from the bog. The Regulations provided for the punishment of any breach of them by a fine not exceeding £5.

F. brought proceedings at Petty Sessions against A. in two cases, in one of which the complaint was that A. in exercise of the above right of turbary cut the turf in such a manner as to prevent the future reclamation of the bog, and in the other of which the complaint was that he neglected to provide reasonable drainage for water to the natural outlet from the bog. Both cases were dismissed.

In both cases the complainant, F., appealed, under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, section 24, to the Court of Quarter Sessions. The County Court Judge convicted the defendant in both cases and fined him one shilling in each of them.

The defendant obtained a conditional order for a writ of certiorari in each of the cases on the ground that it was not a case of a civil nature, and that no appeal lay to the Court of Quarter Sessions.

On motions to make absolute the conditional orders.

Held by the King's Bench Division (Andrews, L.C.J., and Brown, J.) that both the cases were cases of a civil nature.

CERTIORARI.

Under Regulations made under the Irish Land Act, 1903, as to turbary on the lands of William Fleming, Patrick Keenan was authorized to cut turf in a certain bog. These Regulations contained the following provisions :—(*a*) the right of cutting or making turf under

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

the Regulations shall not be exercised in such a manner as to prevent the future reclamation of the bog; (*b*) the turbary banks shall be opened and cut in such a manner as to provide reasonable drainage for water to the natural outlet from the bog, and each occupier shall for this purpose be entitled to construct in a reasonable manner a drain to the natural outlet of water; (*c*) any person offending against any of the Regulations shall be liable to a fine not exceeding five pounds recoverable in a summary manner.

Fleming brought proceedings against Keenan at Petty Sessions in two cases for breaches of the Regulations; the complaint in one of the cases was that in the exercise of his right of turbary he cut turf in such a manner as to prevent the future reclamation of the bog, and in the other case the complaint was that he neglected to provide reasonable drainage for water to the natural outlet from the bog.

At the Court of Petty Sessions the Resident Magistrate dismissed both cases.

The complainant, Fleming, appealed in both cases to the Court of Quarter Sessions under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, section 24.

The County Court Judge convicted Keenan in both cases and fined him one shilling and costs in each of them, with powers of distress and sale.

In each of the cases Keenan obtained a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the County Court Judge, on the ground that the case was not a case of a civil nature and that no appeal lay from the order made at Petty Sessions.

The prosecutor, Keenan, applied to have the conditional orders made absolute notwithstanding cause shown.

Beattie, *K.C.*, and *Stewart* for the prosecutor.

The question at issue is whether the County Court Judge was right in holding that these proceedings fall within the class of cases referred to in section 24 (1) of

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the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, as "cases of a civil nature."

Section 21 of the Irish Land Act, 1903, which provides for the making of these Regulations has the word "punishment" which word we submit imports a criminal matter. The moment a fine is imposed there is the liability to imprisonment.

On the authorities which were discussed in *The King (Sherry) v. The County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (1), neither of these cases is a case of a civil nature. *Reg. v. Paget* (2), was a case in which a person was charged with travelling on a railway without having paid his fare and with intent to avoid payment; it affected no one but the Railway Company and the person charged, yet it was held in that case that the penalty imposed by section 103 of the Railway Clauses Consolidation Act was not a "sum of money claimed to be due and recoverable "on complaint to a court of summary jurisdiction" within the meaning of section 6 of the Summary Jurisdiction Act, 1879. In the judgment of the court in that case, Field, J., said at page 157, "A fine or "penalty is matter of criminal and not civil procedure."

In *Mellor v. Denham* (3), it was held that the Court of Appeal has no jurisdiction to hear an appeal from a decision of the High Court of Justice upon a case stated by justices as to an information for contravening the bye-laws of a school constituted under the Elementary Education Act, 1874, for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, section 47.

In *Seaman v. Burley* (4), it was held that a judgment upon a special case stated by justices on an application to enforce payment of a poor rate by warrant of distress is a judgment in a criminal cause or matter within section 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in imprisonment of the person in default; and therefore an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division on such a case.

(1) [1935] N.I. 211.
(2) 8 Q.B.D. 151.
(3) 5 Q.B.D. 467.
(4) [1896] 2 Q.B. 344.

In *Provincial Cinematograph Theatres, Limited v. Newcastle-on-Tyne Profiteering Committee* (1), it was held that by reason of section 47 of the Supreme Court of Judicature Act, 1873, no appeal will lie from a judgment of a Divisional Court discharging a rule *nisi* to a Profiteering Committee, for a writ of certiorari to quash the decision of the Committee to direct a prosecution under the Profiteering Act, 1919, as such a judgment is a judgment in a criminal cause or matter within that section.

Once the word, and the idea, of "punishment" is present the case cannot be said to be "of a civil nature," and there is no right of appeal.

[They also referred to *Hearne v. Garton* (2), *In re County Council of Derbyshire and Mayor of Derby* (3), and *Clifford and O'Sullivan* (4).]

Warnock, K.C., and *Sheil* for the respondent :—

This is a case of a civil nature. It is a dispute between two persons who are the only people affected by these regulations and is not a matter of public law. It does not follow that because the word "punishment" is used this is a criminal cause or matter.

In *Scott v. Scott* (5), Vaughan Williams, L.J., said in his judgment : "The mere fact that an order in civil "process inflicts a punishment does not make it "criminal."

In *The King (Sherry) v. The County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (6), the prosecutor was referred to as an offender, yet it was held that proceedings taken before the justices in the name of an officer of Customs are not proceedings in a criminal cause or matter. The cases which have been cited on behalf of the prosecutor are based on a breach of public law.

In *In re Dillon* (7), Hayes, J., said in his judgment : "The term 'information' is of well-defined meaning ; "and whether it be in writing or *ore tenus*, is understood

(1) 37 T.L.R. 799.
(2) 2 El. & El. 66.
(3) [1896] 2 Q.B. 297, [1897] A.C. 550.
(4) [1921] 2 A.C. 570.
(5) [1912] P. 241, 251.
(6) [1935] N.I. 211.
(7) 11 Ir. C. L. R. 232, 238.

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"to be the initiatory step in proceedings of a criminal "nature, which are to be disposed of summarily, while "I apprehend the term 'complaint' designates the "initiatory step in summary proceedings of a civil "nature; but equally in both cases there is con- "templated the existence of a matter in controversy "between two parties."

We submit that *Seaman v. Burley* (1) is not good law and ought not to be followed.

In *The King (Sherry) v. The County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (2), Megaw, J., in his judgment said that: "Liability to "imprisonment for an offence is not an absolute test of "criminality within the statute we are considering, but "it is a factor of very considerable importance. Apart "from the case of contempt of court where the legal "sanction has its origin in a very exceptional juris- "diction, I am disposed to think that a satisfactory "and convenient criterion conformable to reported "cases may be found in determining the question at "issue, viz.: Whether as regards any infraction of "the law imprisonment can be imposed as a primary "sanction either as the sole sanction or as alternative "to a fine."

The law is we submit correctly expressed by Lord Shand in *Derby Corporation v. Derbyshire County Council* (3), where he says in his speech in the House of Lords: "The fact that disobedience to an order "brings with it a liability to a penalty does not, in my "opinion, make the original proceeding one of a penal "nature, any more than imprisonment to enforce "obedience to an order in a civil proceeding would "make that proceeding one of a penal character."

The word "conviction" is not mentioned either in The Irish Land Act, 1903, or in the Regulations.

Stewart, in reply, referred to *Rayson v. South London Tramways Company* (4) and *Cattell v. Ireson* (5),

(1) [1896] 2 Q.B. 344.
(2) [1935] N.I. 211.
(3) [1897] A.C. 550, 554.
(4) [1893] 2 Q.B. 304.
(5) E. B. & E. 91.

and to the Petty Sessions (Ireland) Act, 1851, section 10 (2).

Cur. adv. vult.

ANDREWS, L.C.J., delivered the judgment of the Court which was as follows :—

These are two motions to make absolute conditional orders of certiorari obtained by the prosecutor, Patrick Keenan, for the purpose of quashing two orders made by the County Court Judge of the County of Tyrone on the hearing of appeals from orders of the Resident Magistrate, in which he had dismissed certain complaints brought by one, Wm. R. Fleming, against the prosecutor, Patrick Keenan. The charge against Keenan in the one case was that in the exercise of a right of turbary provided for him under certain regulations of the Ministry of Finance, he cut the turf in such a manner as to prevent future reclamation of the bog. In the other case Keenan was charged with neglecting to provide reasonable drainage for water to the natural outlet from the bog on the complainant's lands. In each case the learned County Court Judge reversed the dismiss and imposed a fine of one shilling and costs with power of distress and sale as therein mentioned. The ground on which the conditional orders were obtained was in each case that the proceedings did not fall within the class of cases referred to in section 24 (1) of the Summary Jurisdiction (N.I.) Act, 1935, as " cases of a civil nature " ; and, accordingly, that the County Court Judge had not jurisdiction to hear the appeal.

The regulations referred to, made by the Ministry of Finance on 7th May, 1931, related to turbary on Fleming's holding which is situate in the Barony of Upper Strabane, and County of Tyrone. His holding, purchased under the Irish Land Act, 1903, formed part of the estate of Arthur Richard Cole-Hamilton. Certain occupiers of land in the neighbourhood, of whom Keenan was one, were by the regulations authorised to cut or make turf for the use of their holdings on and from the plots of bog therein specified

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on payment of the sums therein mentioned. The regulations provided (amongst other things) that the right of cutting or making turf should not be exercised in such a manner as to prevent the future reclamation of the bog, and that the turbary banks should be opened and cut in such a manner as to provide reasonable drainage for water to the natural outlet from the bog. It was for alleged breaches of these two regulations that the complaints were made by Fleming, such proceedings being brought under a further regulation which provided that any person offending against any of the regulations should be liable to a fine not exceeding five pounds recoverable in a summary manner.

The appeals to the learned County Court Judge were brought under section 24 of the Summary Jurisdiction and Criminal Justice Act (N.I.), 1935, under which an appeal lies to a Court of Quarter Sessions against an Order of a Court of Summary Jurisdiction, in cases of a civil nature by either party whether he is the complainant or defendant, and in other cases by any party against whom an order is made for payment of any penal or other sum, or for any term of imprisonment, or for the estreating of a recognizance as therein mentioned.

As the Resident Magistrate dismissed both complaints the sole question to be determined is, whether the County Court Judge was right in holding that these proceedings fell within the class of cases referred to in the section as " cases of a civil nature." Although many cases were referred to in argument and several others were since examined by us, we have been unable to find any case in which these words have received judicial interpretation—a somewhat remarkable fact when one remembers that precisely the same words are to be found in sections 22, 23 and 24 (the latter, the appeal section) of the Petty Sessions (Ireland) Act, 1851, and also in section 23 (the appeal section) of the Summary Jurisdiction (Ireland) Act, 1851. The questions which arose for decision in most of the reported cases depended upon the meaning to be assigned to the words " criminal cause or matter " in section 47 of the Judicature (E.) Act, 1873, and in the

corresponding section (section 50) of the Judicature (Ir.) Act, 1877. In the remaining cases the Court had to determine such questions as whether the defendant could be examined in his own behalf, whether the magistrate had power to issue a warrant in default of appearance, or whether the Court had a right to administer interrogatories—all such questions depending upon whether the proceedings were or were not of a criminal character. In our opinion the decisions in such cases, depending upon the construction of different words in other Acts of Parliament, or upon general principles inapplicable to our Summary Jurisdiction code, might prove a dangerous guide, especially when one remembers that no appeal lies unless given by Statute in clear and express terms, the onus lying on the party who asserts the existence of such right. For these reasons we do not propose to refer in this judgment to any of the cases cited.

The prosecutor's main argument is that proceedings under the regulations must be held to be criminal by reason of two provisions :—

(*a*) Section 21 (4) of the Irish Land Act, 1903, which enacts that regulations under the section (*i.e.*, such turbary regulations as are before us in the present case) may provide for the punishment of any breach of them by a fine not exceeding five pounds, recoverable in a summary manner ; and

(*b*) The words of the concluding regulation that any person offending against any of the foregoing regulations shall be liable to a fine not exceeding five pounds recoverable in a summary manner.

The contention is that the power to impose a " fine" by way of " punishment " upon a person " offending " against " the regulations clearly indicates a criminal as distinguished from a civil proceeding. In our opinion this argument is completely answered by a careful examination of certain provisions of the Summary Jurisdiction Acts to which we propose now to refer.

By section 65 (2) of the Act of 1935 that Act is to be construed as one with the Summary Jurisdiction (Ireland) Acts. Accordingly, when one finds the words " cases of a civil nature " in the appeal section

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(s. 24) of the Act of 1935, one must naturally, unless otherwise compelled by clear and unmistakable language, give the words the same meaning as they bear in other parts of the same code, and particularly in the corresponding appeal sections, namely section 24 of the Petty Sessions (Ireland) Act, 1851, and section 23 of the Summary Jurisdiction (Ireland) Act, 1851, both of which received the Royal Assent on the same day. During the course of the argument attention was directed by the Court to the provisions of section 22 (1) of the former Act which enacts that :—

> " In every case where the justices shall be author-
> " ised to award any penal or other sum, they may
> " order that the same shall be paid either forthwith
> " or at such time as they shall see fit to fix for that
> " purpose, and, in cases of a civil nature, that such
> " sum may be paid either at once or by instalments."

The words " such sum " towards the conclusion of this sub-section can only refer to the " penal or other sum " previously mentioned ; and from this it follows that a proceeding may be a " case of a civil nature " notwithstanding that it results or at least that it may result in the justices ordering payment of a penal sum. We would add that the wording of section 24 of the same Act fully warrants the same conclusion.

Still further assistance, however, as to the scope and meaning of the phrase " cases of a civil nature " is derived from a consideration of the Summary Jurisdiction Act, 1851. Here we find words in section 23—the appeal section—similar to, though not identical with those of section 24 of the Petty Sessions Act. Now this Summary Jurisdiction Act may, broadly speaking, be divided into three parts, each part having its separate heading. These headings, in accordance with settled authority, are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to to explain its enactments, but as affording a better key to the constructions of the

sections which follow than might be afforded by a mere preamble (Per Channell, B., in *Eastern Counties, etc., Companies v. Marriage* (1).) More recent authority to the like effect is to be found in the judgment of the Privy Council delivered by Lord Darling in *Martins v. Fowler* (2).

The first part of the Act—from sections 2 to 14, inclusive—has for its heading "Criminal Jurisdiction"; the second part, covering sections 15 to 20, inclusive, is headed "Civil Jurisdiction"; whilst the third part —from section 21 to the end of the Act—falls under the heading "General Provisions." Now, when one looks at the "criminal jurisdiction" sections one finds provisions relating to such crimes as malicious injury to persons and property, the stealing of property, and offences in relation to roads—all matters of a clearly public character. What then is meant by "civil "jurisdiction" in the Act? In examining the relevant sections we find provisions relating to such matters as the possession of tenements, and disputes between masters and servants—matters "of a civil nature." Still more important, however, for our purpose are the powers entrusted to the justices when exercising this "civil jurisdiction." Thus, by the paragraphs numbered 4 and 5 of section 16, the justices, if they find the non-observance of a contract of service by a servant proved, or that such servant engaged with his master under false or forged discharges, are empowered not only to impose a fine, but also, in default of payment of such fine, to order imprisonment. Other sections in this part of the Act render a person who commits the "offences" therein mentioned liable to the specified "punishment."

Such then is what the legislature designates "civil "jurisdiction," exercised, as it seems to us, in cases which the legislature conveniently refers to as "cases "of a civil nature." Parliament, it would appear, in making the distinction between criminal and civil jurisdiction, attached much more importance to the subject-matter of the proceedings than to their form. Indeed, it was obviously for this reason that the words

(1) 9 H. L. C. 32. (2) [1926] A.C. 746, 750.

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"cases of a civil nature" were selected in preference to such words as "civil causes or matters." But, however this may be, one thing is clear—that the wide interpretation which is given by the legislature to the words "cases of a civil nature" in the Summary Jurisdiction Act, of 1851, must be assigned to the same words both in the Petty Sessions Act of 1851, and also in the more recent Act of the same code passed by the legislature in 1935.

We would only add that this conclusion accords with one's natural instincts in the present case, in which by the regulations of the Ministry of Finance limited rights of turbary upon the holding of a single individual are granted or confirmed to a comparatively small number of occupiers of land in the neighbourhood subject to certain restrictive provisions. The offence is purely the abuse or infringement of a civil right. The public, as such, have no real interest in the matter, and a breach of any of the regulations is in no sense an offence against the public law which Viscount Cave considered in *Clifford and O'Sullivan* (1) (at p. 580) to be the first condition of a crime. The cutting of turf in excess of one's rights, which is the substance of the present case, has been a fruitful source of litigation for many generations past in title jurisdiction cases in the County Court throughout the greater part of Ireland. In hearing them the County Court Judge has been exercising a purely civil jurisdiction, and the cases have been clearly cases of a civil nature. For the reasons which we have stated we are of opinion that their nature is not wholly transformed from civil to criminal because of the passing of regulations, the breach of which may be punished by fine. The absurdity of any such argument in the present case would appear to be that an occupier who allowed his donkey to stray, or who failed to close a gate securely in breach of certain other regulations would thenceforth be regarded in the eyes of the law as a criminal.

For these reasons we are of opinion that the motions to make absolute the conditional orders must fail, and

(1) [1921] 2 A.C. 570.

that the conditional orders should be discharged with costs.

Solicitors for the prosecutor : *Donnelly & O'Doherty.*
Solicitors for the respondent : *Shields & Murnaghan.*

J. McC.

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HANNA v. McKIBBEN.

Mar. 4, 21.

Negligence—Cause of action—Fishing boat—Crew co-adventurers—Remuneration by share of profits—Damage to boat—Loss of profits—Remoteness of damage.

The plaintiff was one of the crew of a fishing boat. He was remunerated wholly by a share in the profits or gross earnings of the boat. The boat was damaged in a collision with the defendant's schooner, due to the negligence of the defendant, and the plaintiff lost his share of the profits which would normally have been made during the time the boat was under repair. The plaintiff sued the defendant in the County Court for damages for negligence. The County Court Judge dismissed the case.

On appeal to the Judge of Assize it was—

Held, by Murphy, L.J., that the damage sustained by the plaintiff by reason of the loss of his share of the profits of the boat was not too remote, and that he was entitled to damages.

APPEAL to the Judge of Assize for County Down against a dismiss by the County Court Judge of a Civil Bill claiming damages for negligence.

The facts appear in the judgment.

McSparran for the plaintiff.

Sheil for the defendant.

Murphy, L.J., reserved judgment.

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MURPHY, L.J. : In this Civil Bill Appeal, which was argued before me at the Downpatrick Assizes, I reserved judgment, as both the learned counsel, Mr. McSparran for the plaintiff and Mr. Sheil for the defendant, agreed that the point of law involved was not, so far as they could ascertain, covered by precise authority.

I should have been glad to have stated a case if counsel had asked me to do so, and the parties would thereby have obtained an authoritative decision, but having regard to the small sum involved counsel did not consider that a case stated would be warranted.

The facts are as follows :—

The " Children's Hope " is a boat engaged in the

herring fishery, owned by S. J. Teggart, who was also the master. The plaintiff and two other men formed the crew. The plaintiff and these other two men were remunerated wholly by shares in the profits or gross earnings of the working of the "Children's Hope." [See section 35 (2) of the (English) Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), and section 35 (2) of the Workmen's Compensation Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 16).]

In the present case S. J. Teggart received five-eighths of the profits and the plaintiff and the other two men one-eighth each. On the 27th September, the "Children's Hope" was damaged in collision by the defendant's schooner, and I was informed that S. J. Teggart was paid by the defendant compensation for the damage to his ship and also for the loss of his share in the profits which would have been normally made during the period when the "Children's Hope" was out of commission.

The plaintiff in the present civil bill has claimed for the loss of his share in these profits, and such a share, it is agreed, would have amounted to £3 15*s.* 0d. Negligence on the part of those navigating the defendant's schooner is not disputed for the purpose of this case; but Mr. Sheil has argued: (*a*) that no legal right of the plaintiff was violated by the negligence which caused the collision, and (*b*) that the damages claimed are too remote. He referred me to *Anglo-Algerian S. S. Co. Ltd. v. Houlder Line, Ltd.* (1), in which Walton, J., held that where the defendants by careless navigation had damaged the gates of a dock, and the dock in consequence had to be closed for repair, the plaintiffs, whose ship had in consequence been detained outside the dock in which she had to load a cargo, could not recover damages, on the ground that the defendants' negligence was too remotely related to the plaintiffs' loss. In his judgment, Walton, J., compares the case of damage to an inn, and a would-be guest being put to expense through his inability to obtain accommodation in the damaged inn. Mr. Sheil also referred me to *Société Anonyme de Remorquage à Hélice v. Bennetts* (2), a decision of Hamilton, J. (as he

(1) [1908] 1 K.B. 659. (2) [1911] 1 K.B. 243.

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then was). In that case a tug was engaged, under a towage contract, in towing a ship, when, owing to the negligent navigation of the defendant's ship, the towed ship was sunk. No damage was done to the tug or her equipment by the collision, but a claim was made for the remuneration which the tug would have earned if the towage contract had been completed. Hamilton, J., held that the towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence, so as to be recoverable in law ; and in his judgment, referring to a " point anticipated " by Blackburn, J., he clearly approves of the view that in the case of a " drowned mine " where an action, under the doctrine in *Rylands v. Fletcher* (1), lay for the flooding, no action lay by a workman who in consequence of the stoppage of the mine made less wages than he would otherwise have done. Mr. McSparran on behalf of the plaintiff referred me to passages in *Salmond on Torts* and to the decision of the Court of Appeal in *In re Polemis and Furness Withy & Co.* (2), on remoteness of damage, in which case the Court reaffirmed the principle that once negligence is established the negligent person is liable for all the direct consequences of his negligence, even though these consequences could not have been reasonably anticipated.

If this were a case of a member of a crew who was paid wages it is not argued that under the present circumstances he could sue for loss of wages while the ship was being repaired—Lord Sumner and Blackburn, J., would be convincing authorities against such a cause of action. But the plaintiff in the present case did not receive wages ; he and the other two members of the crew were co-adventurers with the master (who also was the owner) ; the plaintiff's remuneration for work done depended on the profits which resulted from any particular voyage of the " Children's Hope." If there were no profits, the plaintiff would get no remuneration. I do not think that it can be correctly said that the plaintiff was paid a wage calculated on a share of the profits ; the view which I take is that the plaintiff was not entitled to wages, as such, but was

(1) L.R. 3 H.L. 330. (2) [1921] 3 K.B. 560.

entitled to a fixed share of the profits, be these great or small. It is not suggested that the owner-master, Teggart, was not entitled to be compensated for the loss of his share in the profits while his ship was laid up—and indeed he was so compensated. Does it make a difference if the profits, instead of being all payable to the master, were divisible among the master and three others? It seems to me that the master and crew could have joined in a claim for the total profits lost, and unless some objection could be successfully taken on the score of multiplicity of proceedings I can see no objection to individual claims.

It is well known that many fishing boats are thus worked by "co-adventurers"—the practice is recognised in the Workmen's Compensation Acts, to which I have referred. If the ship in which these co-adventurers are fishing be damaged in collision through the negligent navigation of another ship, I do not see any legal objection to the institution of an action, with the owner-master suing for the damage done to his ship, and the master and the three members of the crew suing for the loss of profit.

On consideration of the reported cases on remoteness of damage, I find that in *The Anselma de Larrinaga* (1), Bargrave Deane, J., decided that, when the plaintiffs' steam trawler was sunk in a collision between it and the defendant steamship, the latter being solely to blame, a claim by the plaintiffs for loss of fishing until they got a new vessel to replace the one that was sunk, was not maintainable. The learned Judge based this decision on the earlier cases of *The Columbus* (2), and *The City of Rome* (3). Having regard to the observations of Vaughan Williams, L.J., in *The Racine* (4), the principle applied in these cases does not appear to be altogether satisfactory; but in any event it seems to have been applied only in cases where a ship had been sunk and the full value of the vessel had been given as compensation; and in *The Argentino* (5), Lord Herschell says: "The loss of the use of a vessel and of the

(1) 29 T.L.R. 587.
(2) 3 W. Rob. 158.
(3) 8 Asp. M.L.C. 542, n.
(4) [1906] P. 273, 277.
(5) 14 App. Cas. 519, 523.

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"earnings which would ordinarily be derived from its "use during the time it is under repair, and therefore "not available for trading purposes, is certainly "damage which directly and naturally flows from a "collision."

In the present case I am satisfied on the evidence that there would have been some profit, under ordinary circumstances, from the fishing which would have been carried on during the time occupied in repairs to the "Children's Hope." The sum of £3 15*s.* 0*d.* is accepted as fairly representing the share of the plaintiff in such estimated profits; the loss of these profits, in my opinion, directly and naturally flowed from the collision, and in my opinion the plaintiff is entitled to recover this sum.

Solicitors for the plaintiff: *O'Hara & O'Hagan.*
Solicitors for the defendant: *Fisher & Fisher.*

M. W. G.

IN THE GOODS OF ANNA GILLILAND (DECEASED) (1).

K.B.D. (Probate). 1940.

Feb. 9. Mar. 20.

Will destroyed but not revoked—Proof of due execution of will—Admissibility of letter written after execution of will to prove contents of will.

A testatrix made a will which was prepared for her by an experienced solicitor and which was afterwards destroyed but was not revoked. Another solicitor, who had succeeded to the practice of the former solicitor, proved that the will bore the signature of the testatrix, and two other signatures purporting to be those of persons who signed as witnesses of the execution of the will by her. This was the only evidence of the execution of the will.

On the day on which the testatrix made the will she wrote to A. a letter stating that she had done so, and had left her everything she possessed. This letter was the only evidence of the contents of the will.

Held—

(1) The evidence was sufficient to justify a finding of due execution of the will.

(2) The letter written by the testatrix was admissible in evidence to prove the contents of the will as part of the *res gestae*.

MOTION by Myrtle Davis, the universal legatee under the will of Anna Gilliland, deceased, for an order that the applicant's attorney be at liberty to apply for a grant of administration with the will annexed of the personal estate of Anna Gilliland, the will having been destroyed but not revoked.

The facts appear in the judgment.

Sheil, for the applicant :—

The will can be re-constructed from the letter, and the document so prepared admitted to probate as a copy of the will.

Though the names of the witnesses cannot be ascertained, due execution should be presumed. *In*

(1) In the King's Bench Division (Probate) before Andrews, L.C.J.

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the Estate of C. R. Phibbs, Deceased (1). [He also referred to *In the Goods of Malins* (2) and *Clarke v. Clarke* (3).]

The evidence of the contents of the will is almost contemporaneous with its execution, and is, therefore, admissible. *Johnson v. Lyford* (4).

Robb, K.C., for the next-of-kin :—

The only evidence of the contents of the will is the letter, which was written after the execution of the will. The authority for admitting such a declaration is the decision of the majority of the Court of Appeal in *Sugden v. Lord St. Leonards* (5).

Doubts have been cast on this authority by the House of Lords in *Woodward v. Goulstone* (6).

Atkinson v. Morris (7) is authority for the proposition that declarations made after the execution of a will are not admissible to prove due execution.

ANDREWS, L.C.J.

Mar. 20.

ANDREWS, L.C.J. : This is an application by Myrtle Davis, of Ohio, for an order that the letters of administration as in the case of intestacy to the estate of Anna Gilliland, deceased, granted on 17th February, 1937, to Samuel Browne, of Lisburn, may be revoked, called in and declared void, and for an order that George Johnston, Solicitor, the lawfully appointed attorney of the applicant, Myrtle Davis, be at liberty to apply for a grant of administration with the will annexed of the said Anna Gilliland, which said will, dated 9th January, 1928, was destroyed on 8th July, 1932, but was not revoked.

This is the second application which has been made to me in connection with representation to the estate of this deceased. On 22nd January, 1937, Samuel Browne, one of the next-of-kin of the deceased, applied for a grant of letters of administration, when I made

(1) [1917] P. 93.
(2) 19 L.R.Ir. 231.
(3) 3 L.R.Ir. 306.
(4) L.R. 1P & D. 546.
(5) 1 P.D. 154.
(6) 11 A.C. 469.
(7) [1897] P. 40.

an order, following the form of order in the *Goods of Johnson* (1), directing that administration be granted to the applicant, limited until the original will or an authentic copy of it should be brought into the Registry.

The facts upon which this order was made and the grounds of my decision will be found in the report of the case in [1937] N.I. 156. Briefly the material facts were that on 9th January, 1928, the late Mr. William McIldowie, Solicitor, made a will for the deceased which he put in an envelope and retained custody of in the strong room of his office. Mr. McIldowie died on 30th September, 1929. In July, 1932, Mr. John McIldowie, who succeeded to his practice, received a letter written by Mrs. Gilliland from Ohio, where she had been living with Mrs. Myrtle Davis, in which she requested that her will be destroyed, adding that she had good reasons for doing so. Mr. John McIldowie, who received the letter, carried out his instructions and destroyed the will; but, as such destruction did not take place in the presence of the testatrix, the will was not in law revoked. (Sect. 20 of the Wills Act, 1837).

At the time of the application to me for such grant there seemed, as I stated in my judgment, to be no prospect of the contents of the will ever being proved. Now it is sought by the applicant to prove such contents by a letter written by the testatrix to her on 9th January, 1928—the day upon which she made her will. This letter was discovered by the applicant since the hearing of the last application whilst she was searching through the contents of an old trunk which belonged to her. It is in the following terms :—

"January the 9th, 1928.
"89 Malone Ave.,
"Belfast.

"Dear Myrtle,

"To-day, the above date, I went to — McIldowie's "office and made another will. McIldowie is executor "and trustee. I have left you everything I possess

(1) 11 Jur. N. S. 184.

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"Please keep this letter—it may be useful to you "some time.

"I am your loving
"Mother
"ANNA GILLILAND."

It will be observed that the testatrix styled herself Mrs. Davis's "Mother," the meaning of which was that Mrs. Davis was a niece of the testatrix's husband, and that she had until her marriage been treated by the testatrix as an adopted daughter.

The genuineness of this letter which, with the envelope in which it was enclosed, was duly exhibited before me, was not, and could not have been questioned; and the sole questions which I have to determine are:—(1) whether the due execution of the will has been satisfactorily proved; and (2) whether its contents have been satisfactorily proved by legally admissible evidence. As these questions are quite distinct from one another they must be separately considered and determined.

As to due execution I have no doubt. On this question I am not in any way dependent upon the statement contained in the letter of the 9th January, 1928, in which the testatrix said that on that day she had "made another will." I determine the matter on the evidence of Mr. John McIldowie, who was closely examined before me both by counsel and by myself, and the effect of whose evidence was subsequently embodied for purpose of record in an affidavit. I have complete confidence in Mr. McIldowie and accept without question every word of his testimony. He stated in his evidence that on receipt of the letter of 8th July, 1932, from the testatrix, he had the strong room index looked up, and that he found the will in the envelope which he produced. The envelope bore the following endorsement: "531 Last will of Anna "Gilliland 89 Malone Avenue Belfast. New will made "9th January, 1928. Exor. Wm. McIldowie." Of this endorsement the words "New will made 9th "January, 1928," are in the handwriting of the late Mr. William McIldowie, whilst the remaining portion of the endorsement is in the handwriting of Mr. John

McIldowie. Mr. McIldowie said that he could positively state that he looked at the end of the will, and saw that it was signed by the testatrix and duly attested by two witnesses, but he is unable to remember their names.

In my opinion this evidence fully justifies a finding of due execution. It has long been recognised that there is no necessity for positive affirmative evidence of execution. Were the law otherwise, death, lapse of memory, and other causes would frequently defeat the testamentary intentions of testators. It is the duty of the Court to take into consideration all the circumstances of the case. In the present case the testatrix obviously desired to execute a valid will. It was made for her by a competent and experienced solicitor—one who had made numerous wills for his clients in the course of a practice extended over many years, and who knew well the essential requirements of due execution. It was, moreover, a will which was apparently regular on its face, and in respect of which there is no suspicion of fraud. In such circumstances there is an inherent improbability that Mr. McIldowie neglected or omitted any of the formalities which he knew to be essential, and the maxim *omnia praesumuntur rite esse acta* applies to such a case with very great force. It is unnecessary for me to refer by name to the cases which support this conclusion, or to the grounds upon which it is based. The authorities will be found conveniently collected in Maxwell's Edition of *Miller's Probate Practice*, pp. 96-97, and in *Mortimer's Probate Practice*, 2nd edition, p. 123 *et seq.* I have only to add that the fact that the names of the two attesting witnesses are unknown, and that, accordingly, such witnesses cannot be found or identified, in no way affects the right of the Court in a proper case to declare in favour of due execution. *Estate of C. R. Phibbs, Deceased* (1).

I now pass to the question of the legal admissibility of the letter written by the testatrix on 9th January, 1928, as evidence of the contents of the will. The arguments were based on the conflicting authorities as

(1) [1917] P. 93.

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to the admissibility of post-testamentary declarations of a testator in regard to such contents. In *Quick v. Quick* (1), Lord Penzance held that such declarations were not admissible. In *Sugden v. Lord St. Leonards* (2), the majority of the Court of Appeal, consisting of Cockburn, C.J., Jessel, M.R., James, L.J. and Baggallay, J.A., (Mellish, L.J., dissenting), took the contrary view and expressly overruled *Quick v. Quick* (1). This view was accepted by Sir James Hannen in *Gould v. Lakes* (3), where (at p. 5) he cited *Sugden v. Lord St. Leonards* (2) as authority for the proposition that statements made by a testator after the making of a will, not merely with reference to the contents of the lost instrument, but with reference to the constituent parts of it are admissible. Subsequently, however, in *Woodward v. Goulstone* (4), the House of Lords, consisting of Lord Herschell, Lord Blackburn and Lord Fitzgerald, declined to express any final opinion as to whether such post-testamentary declarations in reference to the contents of a will had been rightly received in *Sugden v. Lord St. Leonards* (2), but it is apparent that they had all grave doubts as to the soundness of the decision on this point. Warren, J., followed *Sugden v. Lord St. Leonards* (2) in the Irish case of *In the Goods of George Ball* (5). In designating it as a plain case and in expressing his surprise that Mellish, L.J., had dissented from the judgment of the Court in *Sugden v. Lord St. Leonards* (2), he suffered from the disadvantage that the case was imperfectly argued and that his attention was never directed to the doubts expressed by the House of Lords in *Woodward v. Goulstone* (4). Later, the English Court of Appeal in *Atkinson v. Morris* (6), whilst recognising the binding character in their Court of the decision in *Sugden v. Lord St. Leonards* (2), referred to the fact that the extension of the admissibility of statements as to the contents of the will made by the testator after the will had been executed had not received the approval of distinguished lawyers in *Woodward v. Goulstone* (4).

(1) 3 Sw. & Tr. 442.
(2) 1 P.D. 154.
(3) 6 P.D. 1.
(4) 11 A.C. 469.
(5) 25 L.R.Ir. 556.
(6) [1897] P. 40.

Finally, I may say that the learned authors of *Phipson on Evidence*, 5th edition, at pp. 157-8, disapprove of the view expressed in *Sugden v. Lord St. Leonards* (1), as "contrary to principle."

Such is the unsatisfactory state of the law which for more than fifty years has been awaiting authoritative decision. I shall only say that were it necessary for me to determine the present case on the ground of the admissibility of post-testamentary declarations to prove the contents of the will I would prefer the decision in *Sugden v. Lord St. Leonards* (1) to the doubts expressed in *Woodward v. Goulstone* (2).

There is, however, another and, in my opinion, a sounder ground on which to admit the letter of 9th January, 1928, as evidence of the contents of the will. This letter came into existence on the day upon which the will was made, and it is, therefore, in my opinion, entitled to be classified not as a post-testamentary statement but as one which was contemporaneous with the making of the will. As such it is admissible as part of the *res gestae*—part of the act itself, or so intimately connected therewith that it may be considered as forming part of the act. Such a statement is not subject to the infirmity which attaches to a statement made after such an interval of time as to allow of fabrication. This principle was applied to the proof of the contents of a will in *Johnson v. Lyford* (3), where the declarations and statements relied upon were of the same date as the will, one of them—a letter—being written, as in the present case, on the evening of the day upon which the will was made, informing the person to whom it was written that he, the testator, had executed the will and had appointed him executor. In the course of his judgment Sir J. P. Wilde said (at p. 546) that he was of opinion that the evidence was admissible, stating as his reason for so holding that "the verbal declarations or statements made by a "testator in and about the making of his will, when "accompanying acts done by him in relation to that "subject, fall within a well-known principle of the

(1) 1 P.D. 154.
(2) 11 A.C. 469.
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"general law of evidence and have always been "admitted, though not made on oath."

In my opinion, this principle is applicable to the facts of the present case, and I base my decision upon it. The case is referred to in the leading text books upon Probate Law and upon the Law of Evidence; and, as far as I am aware, neither principle nor decision has ever been questioned.

In conclusion, I may say that in arriving at this decision, which had necessarily to be based on legal grounds, I entirely ignored the fact that my decision accords with the wishes of the next-of-kin as embodied in the consent which they have signed. I also consider that my decision in no way conflicts with the speech of Lord Herschell, L.C., in *Woodward v. Goulstone* (1), to which I was referred by Mr. Robb. The intention of the testatrix is manifest and clear, and will obviously be fully expressed by a short document, which, in addition to the customary formalities and requisites, appoints Mr. William McIldowie executor and trustee, and leaves all the property of the testatrix of which she died possessed to the applicant, Mrs. Myrtle Davis. The fact that the testatrix subsequently altered her intentions and gave instructions for the destruction of her will in a manner which had no legal validity cannot affect the nature or application of well-established legal principle.

I, therefore, grant the application and order that George Johnston, the lawful attorney of Myrtle Davis, be at liberty to apply for a grant of administration with the will annexed of Anna Gilliland, deceased, said will being dated 9th January, 1928, and being in the terms or to the effect above indicated. It will be unnecessary to revoke or call in the grant of letters of administration as in case of intestacy issued to Samuel Browne on 17th February, 1937, as he died since the institution of this motion and the grant has accordingly become inoperative. The parties are entitled to their costs out of the estate.

Solicitors for the applicant: *Carson & McDowell.*

Solicitors for the next-of-kin: *George McIldowie & Sons.*

(1) 11 A.C. 469 (at p. 478). M. W. G.

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Feb. 19, 29. April 16. May 9.

Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 *Geo.* 5, c. 15)—*Acquisition by Northern Ireland Road Transport Board of every road motor undertaking operated for hire or reward, which had been commenced before 1st June*, 1934, *paying compensation—Prohibition of use of motor vehicles on public highway for hire or reward except with consent of Board—Motor transport undertaking commenced after 1st June*, 1934—*Goodwill lost by reason of prohibition—Property taken without compensation—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sec.* 5, *sub-sec.* 1—*Validity of Prohibition—Right of Attorney General to intervene.*

By the Road and Railway Transport Act (Northern Ireland), 1935, sec. 5, sub-sec. 1, it was enacted that the Northern Ireland Road Transport Board should acquire every road motor undertaking operated for hire or reward in Northern Ireland immediately before the passing of the Act and then providing a transport service which had been commenced before 1st June, 1934, paying compensation therefor, and by sec. 15, sub-sec. 1 of the Act it was enacted that a person other than the Board should not use a motor vehicle on any public highway for the conveyance of passengers or the carriage of merchandise for hire or reward except with the consent of the Board.

On 11th June, 1934, the defendant had commenced to operate a road motor undertaking for the carriage of merchandise for hire, and he had a substantial business with a valuable goodwill. The Board consented to the use of motor vehicles on the highway by the defendant for this undertaking, but that consent was subsequently revoked. The defendant having continued to use motor vehicles on the highway for hire or reward after the revocation of the consent, the Board brought proceedings against him at Petty Sessions for breach of sec. 15, sub-sec. 1 of the Act. The Resident Magistrate dismissed the case on the ground that, as sec. 15, sub-sec. 1, enacted that goodwill should be taken from the owners without compensation, it was *ultra vires* the Parliament of Northern Ireland. On appeal to Quarter Sessions the Deputy Recorder of Belfast stated a case for the opinion of the Supreme Court. After hearing counsel for the parties, the Court invited the Attorney-General to argue certain questions which had arisen in the course of the proceedings.

Held by Andrews, C.J., and Murphy, L.J. (Babington, L.J., dissenting), that sec. 15, sub-sec. 1, of the Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 15), did not enact that goodwill should be "taken" within the meaning of

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the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 15), sec. 5, sub-sec. 1, and is not *ultra vires* the Parliament of Northern Ireland.

Held by the Court that the Attorney-General was entitled to intervene and to appear at the hearing.

CASE STATED for the opinion of the Supreme Court of Judicature in Northern Ireland by the Deputy Recorder of Belfast, as follows :—

1. This case which was heard by me, sitting as Deputy Recorder of the City of Belfast, on the 17th day of June, 1939, was an appeal brought by the Northern Ireland Road Transport Board against the decision of the Resident Magistrate, Mr. McCoy, K.C., dismissing a summons brought by the Board against Albert Benson, of Moira, County Down, which was in the following terms :—

> That the defendant on or about the 3rd day of May, 1938, at Belfast, did use a motor vehicle on a public highway for the carriage of merchandise, namely, five tons of potatoes, the property of Annie Hayes, for hire or reward, without the consent in writing of the Northern Ireland Road Transport Board and the approval of the Ministry of Home Affairs, contrary to section 15 of the Road and Railway Transport Act (Northern Ireland), 1935.

2. The following facts were admitted or proved before me :—

(1) The defendant, Albert Benson, for nine years immediately prior to the 11th day of June, 1934, had been a motor driver in the employment of Messrs. Hewitt Brothers, Sandy Row, Belfast, house furnishers.

(2) On or about the 11th day of June, 1934, the defendant, having acquired a motor lorry, commenced business on his own account as a haulier.

(3) The defendant had soon a number of regular clients in addition to the casual business of any ordinary haulier, and he built up a business which produced an average profit of £8 to £9 per week, and had a goodwill of value.

(4) About the time that the defendant commenced

his said business he heard discussions amongst persons in the haulier business about the Government going to take over transport undertakings which were going concerns, and pay compensation.

(5) The defendant did not read any report by Sir Felix Pole, (no report put in evidence); nor did he see any announcement by the Government of Northern Ireland with regard thereto, (no announcement proved).

(6) The defendant continued to carry on his said business, and was still carrying it on at the date of the passing of the said Road and Railway Transport Act, namely, the 16th day of July, 1935, and the defendant is still carrying on his said business.

(7) The Board in August, 1935, issued a consent in writing pursuant to section 15 (1) of the said Act to the use by the defendant of motor vehicles for the carriage of merchandise for hire or reward until the Board determined their said consent. The said consent duly received the approval of the Ministry of Home Affairs pursuant to the provisions of the said section 15 (1) of the said Act.

(8) By letter, dated the 1st day of April, 1937, the Board, having ascertained that the defendant's business was not a road motor undertaking within the meaning of section 5 of the said Act, duly revoked the said consent.

(9) Notwithstanding the said determination of the said consent, the defendant continued to carry on his said haulier business.

(10) On the 29th day of April, 1937, the Board purchased the defendant's motor lorry for the sum of £430, the whole of which sum Messrs. Bowmakers, Ltd., received, and portion thereof was retained by them in respect of their hire-purchase charges.

(11) The defendant acquired another motor lorry, and continued his said business.

(12) The defendant admits that on the 3rd day of

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May, 1938, he carried merchandise for hire or reward without the consent of the Board or the approval of the Ministry of Home Affairs as alleged in the said summons referred to in paragraph 1 of this case.

(13) The defendant's business was operated immediately before the passing of the said Act. but was not then providing a road transport service which had been commenced before the the 1st day of June, 1934.

3. It was contended on behalf of the defendant :—

(1) That goodwill is " property " within the meaning of section 5 of the Government of Ireland Act, 1920, and that the provisions of the said Act of 1935, *qua* the defendant, are *ultra vires* the Parliament of Northern Ireland by reason of the provisions of the said section 5 of the Government of Ireland Act, 1920 ; and, accordingly, that the defendant did not commit any offence when he carried merchandise for hire or reward on the said 3rd day of March, 1938 ; and that the decision of the Resident Magistrate was right and should be affirmed.

4. It was contended on behalf of the Board :—

(1) That goodwill was not " property " within the meaning of the said section 5 of the Government of Ireland Act, 1920.

(2) That, even if it were, the provisions of the said Act of 1935 did not operate so as either directly or indirectly to take any property without compensation.

(3) That the " pith and substance " of the Act of 1935 is the co-ordination of transport services in Northern Ireland, and the fact that its provisions cause incidental hardship does not render it *ultra vires*, and that the hardship (if any) complained of by the defendant does not, therefore, render the said Act of 1935 *ultra vires*.

(4) That the decision of the Resident Magistrate in dismissing the said summons was wrong and should be reversed.

5. I accepted the contentions on behalf of the defendant and held :—

(1) That goodwill is " property " within the meaning of the Act of 1920.

(2) That *qua* the defendant the provisions of section 15 of the Act of 1935 are *ultra vires* the Parliament of Northern Ireland, and, accordingly, that the defendant did not commit an offence by carrying merchandise for hire or reward on the 3rd day of March, 1938, without the consent in writing of the Board and the approval of the Ministry of Home Affairs.

(3) That the decision of the Resident Magistrate in dismissing the said summons should be affirmed with twelve guineas costs.

6. That the question for the consideration of the Court is whether I was right in so holding.

Lowry K.C., and *Sheil* (for *McDermott K.C.*, and *Curran* serving with His Majesty's Forces) for the Northern Ireland Road Transport Board.

We do not argue that goodwill is not property within section 5 of the Government of Ireland Act, 1920. That section is directed against the confiscation of property. It is intended to protect certain sections of the community. To " take " property infers the transfer of property from one person to another.

To render property of no value is not to " take " it within the meaning of the section. Nothing was taken from the defendant, except his lorry, and for that he was amply compensated. The defendant's complaint is not that the Board acquired his undertaking, but that he was forbidden under a penalty to carry it on. The objects of the Road and Railway Transport Act (Northern Ireland), 1935, are stated in the preamble as being " to provide for the establishment of a Road " Transport Board for Northern Ireland and for the " transfer to that Board of various road transport " undertakings and interests." Section 4 states the main purpose of the Act as " the provision of a system " of transport by road, railway and other means of

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"transport in Northern Ireland which—
"(*a*) is properly co-ordinated, and
"(*b*) gives efficient, economical and convenient transport services to the public."

The principle of construction to determine whether a statute is valid is best stated by Lord Atkin in *Gallagher v. Lynn* (1).

The "pith and substance" of the Act is not to take property without compensation. If in effecting the objects of the Act hardship is incidentally caused to individuals, that is not sufficient to invalidate the Act. Even if the objects of the Act are such as otherwise to infringe the principle as laid down in *Gallagher v. Lynn* (1), section 15, by providing for the carrying on of undertakings under licence, provides a complete loophole.

Chambers, K.C., and *Belford*, for the defendant:—

The legislature is slow to deprive a person of property without compensation. The Courts will strive to avoid any such construction, unless the Act in question gives express and unequivocal power to disturb vested interests.

Central Control Board (Liquor Traffic) v. Cannon Brewery Company, Ltd. (2), per Lord Atkinson at p. 752. *Newcastle Breweries, Ltd. v. The King* (3), per Salter, J., at p. 866. *Robinson & Co. v. The King* (4), per Bankes, L.J., at p. 198. This Act cannot be construed otherwise than as giving a power to deprive a person of his property, nor does it provide any means whereby the defendant can be compensated. Therefore, there is no alternative but to construe the Act as taking property without compensation. The relevant date for determining whether persons have vested interests in property is the date on which the Act came into operation. The effect of the Act is that any person who had commenced business a fortnight before the date on which the defendant commenced would be entitled to compensation, whereas the defendant is not.

(1) [1937] A.C. 863, 870.
(2) [1919] A.C. 744.
(3) [1920] 1 K.B. 854.
(4) [1921] 3 K.B. 183.

Such a distinction is not a necessary incident of effecting the objects of the Act. The "pith and "substance" of the Act is the co-ordination of all transport in Northern Ireland in the hands of the Board and the railway companies. It was an inevitable part of the scheme that individual undertakings should be taken over. This fact distinguishes the present case from the facts in *Gallagher v. Lynn* (1). It is also distinguishable because in that case the Act in question did not deprive a man of his business, though it did prevent him from carrying it on as heretofore. The Board and the Ministry of Home Affairs in pursuance of the powers conferred by section 15 of the Act have sought, by revoking the licence to the defendant, to do something which Parliament itself had no power to do; viz., to deprive the defendant of his property. The Act is *ultra vires* in so far as it prohibits the defendant from carrying on his transport undertaking without a licence.

In order to "take" property within the provisions of the Government of Ireland Act, 1920, it is not necessary to show that any person has possession of the property after the taking. To take means to take away, and it is immaterial whether that which is taken away is given to another.

Lowry, K.C. (in reply):—

The context of section 5 of the Government of Ireland Act, 1920, shows that "take," in the sense in which it is there used, means to take over. The particular cases specified are all of a confiscatory nature, where property is transferred either to another person or to the State. The section is intended to prevent a totally different evil.

The case was adjourned in order that the Court might invite the Attorney-General to appear and argue certain matters.

Black, A.-G., appeared.

(1) [1937] A.C. 863.

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Chambers, K.C., objected to the intervention of the Attorney-General on the ground that there are no rules allowing such intervention.

Black, A.-G. :

The Attorney-General has the right to intervene in any proceedings on the invitation of the Court. *Croft v. Dunphy* (1). *Moore v. The Attorney-General for the Irish Free State* (2).

There are rules in Eire conferring such power, viz. Order XX. This Order was invoked in *Pigs Marketing Board v. Donnelly (Dublin), Ltd.* (3).

In Canada the Attorney-General is apparently allowed to intervene, though it is uncertain whether he can intervene as of right or only upon service of notice.

[He referred to *Shannon v. Lower Mainland Dairy Products Board* (4), *Trustees of the Ottawa Roman Catholic Separate Schools v. The Quebec Bank* (5), *City of Montreal v. Montreal Street Railway* (6).] It would appear that the usual procedure is that notice is served on the Attorney-General who may then apply for leave to intervene. There are many reported cases where the Attorney-General has not intervened, though questions of the validity of statutes were involved. [He referred to *Hunter v. McKinley* (7), *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.* (8), *Workmen's Compensation Board v. Canadian Pacific Railway Co.* (9), *McGregor v. Esquimalt and Nanaimo Railway Co.* (10), *Toronto Corporation v. Bell Telephone Company of Canada* (11), *Citizens' Insurance Company of Canada v. Parsons* (12).]

[ANDREWS, C.J. : The Court is satisfied that it has power to invite the Attorney-General to intervene.]

(1) [1933] A.C. 156 at pp. 160 and 165.
(2) [1935] A.C. 484, 488.
(3) [1939] I.R. 413, 415.
(4) [1938] A.C. 708, at pp. 709 and 716.
(5) [1920] A.C. 230, 236.
(6) [1912] A.C. 333, 336.
(7) [1923] 2 I.R. 165.
(8) [1923] A.C. 695.
(9) [1920] A.C. 184.
(10) [1907] A.C. 462.
(11) [1905] A.C. 52.
(12) 7 App. Cas. 96.

The phrase " pith and substance " was first used by Lord Watson in *Union Colliery of British Columbia v. Bryden* (1), and is properly used in Canadian cases where the question which arises for determination is whether the particular facts fall within the field of legislation forbidden or proper to the Dominion legislature under the provisions of sections 91 and 92 of the British North America Act, 1867, *Attorney-General for Ontario v. Reciprocal Insurers* (2). Similarly in determining whether a statute is within the allowed or the forbidden categories as set out in section 4 of the Government of Ireland Act, 1920, the Court ought properly to look at the " pith and substance " of the statute, *Gallagher v. Lynn* (3). Section 5 deals not with valid and invalid fields of legislation, but with the effects of legislation. Even though the " pith " and substance " of a statute may have been within the sphere permitted by section 4, the statute may still be void as infringing one of the matters set out in section 5. The " pith and substance " test is applicable for the purpose of considering the validity of legislation by reference to subject matter, but it is not appropriate to cases where the legislative power is limited by reference to the effects of its operation. If the Act of 1935 has the effect of taking the defendant's property without compensation, then, whatever its " pith and " substance " may be, it is *ultra vires*.

The authorities seem clearly to indicate that goodwill is property. [He referred to *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.* (4), under the Stamp Acts ; *Attorney-General v. Boden* (5) under the Finance Act, 1894 ; *In re Leas Hotel Company* (6) and section 55 of the Bankruptcy Act, 1914.] The only section of the 1935 Act which purports to take property is section 5. The present undertaking was not taken under that section. It is by reason of the operation of section 15 that the defendant is precluded from carrying on his business. There is a distinction between taking property and the mere negative

(1) [1899] A.C. 580, 587.
(2) [1924] A.C. 328, 337.
(3) [1937] A.C. 863.
(4) [1901] A.C. 217.
(5) [1912] 1 K.B. 539.
(6) [1902] 1 Ch. 332.

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prohibition of its enjoyment, *France Fenwick & Co. v. The King* (1). The taking of property necessarily implies its transfer as opposed to its being rendered useless in the hands of the owner. The whole business of the former private transport operators, or of any one of them, did not necessarily pass to the Board on its creation. A statute which gives a public body power to take property may be a taking of property, *James v. Cowan* (2).

Chambers, K.C. (in reply):—

France Fenwick & Co. v. The King (1) is distinguishable because the prohibition in the present case is not for a short time but permanent. Section 15 of the 1935 Act in effect kills the defendant's business and transfers his goodwill to the Board.

[ANDREWS, C.J.: The principle as stated by Wright, J., in *France Fenwick & Co. v. The King* (1) was general in its character and was not dependent on the fact that the prohibition was merely temporary].

The legislation in question in *France Fenwick & Co. v. The King* (1) was emergency legislation and the rights of the legislature on such occasions are extended beyond their otherwise permissible ambit.

Cur. adv. vult.

ANDREWS, C.J.

May 9.

ANDREWS, C.J.: The point involved in this case is one of considerable importance and difficulty. Briefly expressed, it is whether the learned Deputy Recorder of Belfast was right in holding that section 15 (1) of the Road and Railway Transport Act (Northern Ireland), 1935, is *qua* the defendant *ultra vires* the Parliament of Northern Ireland.

The material facts are that the defendant acquired a motor lorry and commenced business as a haulier on 11th June, 1934. The business, it is found, produced an average profit of £8 or £9 per week, and, accordingly, had a goodwill of some value. About the time that he commenced business the defendant heard discussions amongst persons in the trade about the Government

(1) [1927] 1 K.B. 458. (2) [1932] A.C. 542.

going to take over transport undertakings for which they would pay compensation, but he read no official report or announcement on the subject. The defendant was still carrying on this business when the Act was passed on 16th July, 1935. In the following month the Board issued a consent in writing pursuant to section 15 (1) of the Act to the use by the defendant of motor vehicles for the carriage of merchandise for hire or reward until the Board otherwise determined. This consent, which duly received the approval of the Ministry of Home Affairs pursuant to the provisions of the section, remained operative until it was revoked by letter from the Board of 1st April, 1937—a purely administrative act in no way compelled by the statute. Notwithstanding such determination the defendant continued to carry on his business. On 29th April, 1937, the Board purchased the defendant's motor lorry. This was not a purchase of his "undertaking" or business under or in pursuance of section 5, which contains the compulsory transfer or acquisition provisions of the Act. It was merely a voluntary purchase effected in the open market, the motive of which doubtless was a desire to minimise such hardship or loss as might result to the defendant from his possession of a motor lorry which he could no longer use on the public highway in the unrestricted manner in which he formerly did for the carriage of merchandise for hire or reward. In these circumstances it is somewhat remarkable to find that shortly afterwards the defendant acquired another motor lorry with which he proceeded to carry on his business in the same manner in which he formerly did. He admits that on 3rd May, 1938—the day of the alleged offence—he carried merchandise for hire or reward without the consent or approval required by section 15 (1) of the Act.

The reason for the Board's revocation of their consent is found in the case stated to have been that they ascertained that the defendant's business was not a road motor undertaking within the meaning of section 5 of the Act as it had not been commenced before 1st June, 1934. For the same reason the "undertaking" could not be acquired by the Board under Part II. of the Act.

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For his defence the defendant relies upon section 5 (1) of the Government of Ireland Act, 1920, which, so far as is material, provides that in the exercise of their power to make laws under that Act the Parliament of Northern Ireland should not make a law so as directly or indirectly to take any property without compensation. It was contended that the goodwill of the defendant's undertaking is " property " within such section, and that, as section 15 (1) of the Act of 1935 has operated so as to deprive him of the goodwill of his undertaking without compensation, the section is, *qua* the defendant, *ultra vires* the Parliament of Northern Ireland. Thus, it was submitted, no offence was committed. Both the Resident Magistrate who heard the summons and the Deputy Recorder who heard the appeal held with the defendant and dismissed the summons.

After the arguments addressed to us by counsel for the Board and for the defendant had concluded, we intimated that we proposed to invite the Attorney-General to argue certain questions which arose for determination upon the *ultra vires* issue. In my opinion our right to take this course is supported by both principle and authority. It is in my opinion a power inherent in the Court. I have had the advantage of reading the portion of Lord Justice Murphy's judgment which deals with this matter ; and, as my views are in entire accord with all that he has written, I content myself with merely expressing my respectful concurrence.

I accordingly pass on to a consideration of the legislation assailed, asking myself whether it has resulted in " property " of the defendant being directly or indirectly " taken " from him without compensation. I have no doubt that the goodwill of the defendant's undertaking is " property " within the meaning of that word as used in section 5 (1) of the Government of Ireland Act. The learned Attorney-General, following the course taken by counsel for the Board, candidly admitted that he could not argue otherwise. He cited to us from the speeches of the Law Lords in *Commissioners of Inland Revenue v. Muller & Co.'s*

Margarine, Ltd. (1), where the question as to whether goodwill was property arose under the Stamp Act of 1891. In *In re Leas Hotel Co.* (2), Kekewich, J., in a debenture holder's action, held that the word " property " in the debentures was sufficient to include the goodwill or business of the company. I would also refer in this connection to *Wedderburn v. Wedderburn* (*No.* 4) (3)—a partnership case—in which Romilly, M.R., at p. 104 held that the goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of the concern, and that a share of it properly, and as of right, belonged to the estate of the deceased partner. " Goodwill," he said, "mani- " festly forms a portion of the subject matter which " produces profits which constitutes partnership " property."

The only question which remains to be considered is whether section 15 (1) of the Act effected a " taking " of the goodwill of the defendant's road motor undertaking without compensation. The words of the sub-section must be carefully noted :—

> " A person other than the Board shall not use a " motor vehicle on any public highway for the " conveyance of their passengers or their luggage " or the carriage of merchandise for hire or reward " except with the consent in writing of the Board " and the approval of the Ministry of Home " Affairs."

Assuming, as this Court did in *Robb v. Electricity Board for Northern Ireland* (4), that when section 5 (1) of the Government of Ireland Act, 1920, prohibits Parliament from making a law to take property without compensation this means that it shall not authorise property to be so taken, yet I am of opinion that section 15 (1) of the Act does not offend against this provision. There is in my judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive

(1) [1901] A.C. 217.
(2) [1902] 1 Ch. 332.
(3) 22 Beav. 84.
(4) [1937] N.I. 103 (at p. 123).

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provision which merely involves interference with the owner's enjoyment of property. This distinction was clearly taken in *France Fenwick & Co., Ltd. v. The King* (1), to which we were referred by the learned Attorney-General. That was the case of a petition of right in which the suppliants were the owners of a vessel which arrived in the Thames with a cargo of coal during a coal strike on 2nd April, 1921. Under Regulations which then existed the Government were empowered to requisition ships, to prohibit the unloading of ships, and to take possession of stocks of coal. On the day of the vessel's arrival a Customs officer, acting on instructions, forbade the discharge of the vessel without permission. The vessel, accordingly, lay with the coal on board until 21st April, on which date the Government requisitioned the coal, and the discharge was ultimately completed on 23rd April. The suppliants, contending that the vessel had been requisitioned, or, alternatively, that possession of her had been taken by the Government, claimed compensation under the Regulations, or, alternatively, at common law for her detention from 2nd April to 23rd April. It was held by Wright, J., first, that requisition under the Regulations, which involved some effective and positive dominion or control, was not effected until the 21st, entitling the suppliants to compensation in respect of two days only. Secondly, dealing with the common law right to compensation for interference with a subject's property, the learned Judge said that he would assume that the Crown had no right at common law to take a subject's property for reasons of state without paying compensation. "I think, however," he said, "that the rule can only "apply (if it does apply) to a case where property is "actually taken possession of, or used by, the Govern- "ment, or where, by the order of a competent authority, "it is placed at the disposal of the Government. A "mere negative prohibition, though it involves inter- "ference with an owner's enjoyment of property, "does not, I think, merely because it is obeyed, carry "with it at common law any right to compensation.

(1) [1927] 1 K.B. 458.

" A subject cannot at common law claim compensation " merely because he obeys a lawful order of the State."

This principle appears to me to be directly applicable to the present case. Section 15 (1) did not either expressly or impliedly transfer the possession or ownership of the goodwill of the undertaking from the defendant to the Board. It did not effect a " taking " of the goodwill. The " monopoly " argument advanced by defendant's counsel carries no weight when one bears in mind, quite apart from available rail transport, the various purposes for which under section 15 (4) motor vehicles may be used on the public highway and to which the restrictive provisions of section 15 (1) do not apply. Whilst these purposes remain authorized it is not in my opinion correct to say that the undertaking or its goodwill is lost or destroyed.

Section 15 (1) in my opinion amounted at most to a mere negative prohibition, or, as I would prefer to call it, in the words of the marginal note, a " restriction " as to the user for certain purposes of motor vehicles for reward upon the public highway—an interference with the full enjoyment of property. The only way in which an undertaking with its goodwill can be " acquired " by the Board is by the procedure set out in section 5. The defendant's undertaking is excluded from the operation of this section by the definition of the word " operated " which permits of the Board acquiring only those undertakings which were providing a road transport service before 1st June, 1934.

In this connection I would repeat what I stated during the argument, that if the defendant has any grievance, which I do not admit, it is one which results from this definition of the word " operated " in section 5 (1) of the Act rather than from the provisions of section 15 (1). The policy of the Act was to give a monopoly of the conveyance of passengers and the carriage of merchandise for hire or reward by road to the Board subject to the exceptions specified in section 15 (4). This was a perfectly legitimate policy which was dictated by ruthless and oppressive competition ; and it was absolutely necessary in order to

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give effect to it that a restrictive clause such as 15 (1) should be embodied in the Act. Without it new motor undertakings could have been commenced, and the monopoly established by the Act would have been lost almost as soon as it had been created : the evil which the Act was passed to overcome would have presented itself anew. For this reason section 15 (1) was in my opinion a necessary complement to section 5 (1). This is, I think, fully recognised by the defendant and his legal advisers so far as concerns the owners of undertakings acquired and compensated for under the provisions of the Act. So also its reasonableness and necessity must be recognised in the case of motor undertakings which it might be attempted to establish after the date of the passing of the Act. It is only with respect to road motor undertakings commenced between 1st June, 1934, and 16th July, 1935, when the Act became law that any difficulty has arisen. This, I repeat, is not due to section 15 (1), whose restrictive provisions apply to all road motor undertakings alike, and were properly made so to apply if the monopoly established by the Act is to be maintained. It is section 5 (1)—the acquisition section—which draws the distinction between undertakings which were in existence prior to 1st June, 1934, and those which were subsequently established. It was the former alone which were to be acquired and compensated for. If the defendant's undertaking had been acquired, and he had received compensation for the goodwill of his business, he could have had no complaint. Accordingly, if there is any *ultra vires* provision in the Act, which, it must be understood, I am not to be taken as deciding, it lies in the words in the definition of "operated" contained in section 5 (1)—"which had "been commenced before the first day of June, "nineteen hundred and thirty-four." The defendant's remedy, therefore, if any, should have been by suit in the Chancery Court in which he would have sought (1) a declaration as to the *ultra vires* character of these words in the definition clause of section 5 (1) of the Act ; and (2) an order to compel the Board to acquire and compensate him for his undertaking in manner

provided by the Act. He does not appear to have ever even requested this remedy. He preferred to carry on his business as long as he was permitted to do so by a consent and approval given to him under the very section which he now impugns. When such consent and approval were withdrawn he sold his lorry to the Board and, as above mentioned, immediately afterwards purchased another lorry contrary to what must have been at least the spirit of the Board's purchase from him. He has since defiantly carried on his business in the assertion of rights which, in my opinion, he does not possess. If he is entitled to succeed in the defence which he has set up in these proceedings the results will, indeed, be startling. He will be authorised to continue his business indefinitely. So also will be twelve others who are similarly circumstanced to him. Not only will they all be able to carry on businesses of the size of their businesses when the Act was passed ; but they will be able to increase the number of their lorries and the volume of their trade at their own unrestricted will and pleasure. They, the persons who commenced business when the Government proposals for acquisition were, as the case finds, being publicly discussed, will become an entirely privileged class, with rights wholly superior to those whose undertakings were in existence prior to 1st June, 1934. The old suicidal competition will be revived ; and this ill-fated Act of Parliament, which has already resulted in such heavy financial loss, will cease to provide any adequate protection for the statutory Board which it created. Still greater economic disaster will, accordingly, follow. Thus, it will be seen, the point that I make as to procedure is no mere technicality. It is one of real substance ; for the result of a successful attack upon section 15 (1) would be so entirely different from that which would follow from a successful challenge of section 5 (1).

I shall conclude this judgment by saying that in my opinion it is this very confusion of procedure which has resulted in the peculiar form of the finding of the learned Deputy Recorder—upon the correctness of which our opinion is sought—"that *qua the defendant* the pro-

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"visions of section 15 of the 1935 Act are *ultra vires*." Counsel were unable to cite any precedent for a Court holding the provision of a public Act of Parliament to be *ultra vires* in reference to an individual, or even a limited class of individuals, whilst it is admittedly valid as regards the rest of the community which it affects. I shall only say that I should like authority for so holding before doing so.

In my opinion the three questions which I understand the Deputy Recorder to submit to this Court should be answered as follows:—(1) Yes; (2) No; and (3) No. The plaintiffs are entitled to their costs of the case stated, which we measure at twenty guineas.

BABINGTON, L.J.

BABINGTON, L.J.: It is with some regret that I find myself in disagreement with the other members of the Court. I listened to the arguments on both sides and to the Attorney-General with attention, and I was the more inclined to accede to his defence of the statute by reason of the fact, which I mentioned to counsel at the opening of the case, that as Attorney-General I must have certified it to be *intra vires* before it received the Royal Assent. But after full consideration I find myself driven to the conclusion that the statute is *ultra vires* and that the defendant is entitled to succeed.

The matter comes before us upon a case stated by the Deputy Recorder of Belfast holding that the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, are *ultra vires* the Parliament of Northern Ireland in so far as they purport to confer powers on the Northern Ireland Road Transport Board, established by the Act, directly or indirectly to take the goodwill of the defendant's road transport undertaking without compensation contrary to the provisions of section 5 of the Government of Ireland Act, 1920.

The case, though its subject matter is not large, raises questions of general importance and must be determined on strict legal principles. It appears that for some time prior to 11th June, 1934, the Government of Northern Ireland had been considering the co-

ordination of road motor transport by taking over all existing undertakings and placing them under some form of unified control, and from the facts found in the case and statements made during the argument by counsel on both sides I have no doubt that it was generally known in June, 1934, that the Government were about to legislate on some such lines. Any legislation of this nature would, of course, necessitate the expropriation of existing transport undertakings whether the Government were to acquire them directly or confer powers of compulsory acquisition on a nominee ; and if these undertakings were to be acquired, the acquisition would be subject to the provisions of section 5 of the Government of Ireland Act, 1920 ; the relevant provisions of this section being as follows :

> " In the exercise of their power to make laws
> " under this Act neither the Parliament of Southern
> " Ireland nor the Parliament of Northern Ireland
> " shall make a law so as directly or indirectly to
> " take any property without compensation. Any
> " law made in contravention of the restrictions
> " imposed by this sub-section shall in so far as it
> " contravenes those restrictions be void."

The framework of section 5 is somewhat disjointed but in *O'Neill v. The Northern Ireland Road Transport Board* (1), this Court held that this prohibition is general and extends to any kind of property, and is not limited to certain categories set out in the section *ejusdem generis*. On 11th June, 1934, the defendant acquired a motor lorry on the hire purchase system and commenced business on his own account as a haulier. His state of mind and the motives which actuated him in this venture are really immaterial, but counsel for the Board have suggested that he started this business with a view to having it acquired under the anticipated legislation and in the belief that he would shortly have some kind of claim against someone for compensation. I can find no evidence in the case stated to support this suggestion, and it cannot be inferred merely from the date on which he acquired his lorry and began to ply for hire. It cannot be put more strongly against him

(1) [1938] N.I. 104.

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than to say that he must have been aware at that time that his business might be interfered with by legislation, but on the facts I can find no more reason for holding that he came in deliberately to take advantage of some possible legislation than for holding that he had already determined to start this business and went on with it in spite of adverse rumours. If the latter assumption be the true one, he may well have made his decision relying on section 5 of the Government of Ireland Act, 1920, which the law presumes him to have been aware of, whatever may have been his notions as to whether the threatened parliamentary action would or would not ultimately assume shape in an Act of Parliament. I, therefore, propose to deal with the defendant's undertaking on the same footing as all those which have passed to the Board, and in respect of which compensation has been paid under the Act, and as having been commenced in good faith. He started his business on 11th June, 1934, and he, therefore, traded for a little over thirteen months before the passing of the Road and Railway Transport Act (Northern Ireland) on 16th July, 1935. At that date the business must still have been a fledgeling, but it is stated in paragraph 3 of the case to have reached an average profit of £8 or £9 per week and to have a goodwill of value, which, I apprehend, is more than could be said of many of the undertakings taken over under this Act, and is sufficient to qualify the business as a "*profit earning*" undertaking under the Second Schedule. Moreover, counsel for the Board, and the Attorney-General, who appeared on the invitation of the Court, admitted that "goodwill" is property within the meaning of section 5 of the Government of Ireland Act, 1920, and it is clearly recognised to be property by the Act we are dealing with; see the Second Schedule by which "tangible "assets" are defined to mean the entire assets of the undertaking "*exclusive of goodwill.*" These tangible assets are paid for by means of "A" Stock, under the Second Schedule, and this stock cannot exceed the amount paid for the tangible assets "exclusive of "goodwill," section 19 (3), which is paid for by the

issue of " B " stock, section 19, and the fact that the " goodwill " of all undertakings acquired under the Act has been paid for in " B " stock has been before this Court on several occasions. The defendant was, therefore, the owner of a road transport undertaking which was profit earning and had a goodwill of value.

The Board, under powers conferred upon them by the Act, are attempting to prevent the defendant from carrying on his business, thereby destroying his average profit of £8 to £9 per week and putting an end to his " *goodwill*," and it is common case that the Act gives them power to do this without making any compensation if the Act is *intra vires*. Section 5 (1) of the Act provides that " The Board shall, within a " period of six months from the day on which this Act " comes into operation or within such longer period as " the Minister of Home Affairs may allow, acquire " every road motor undertaking operated for hire or " reward in Northern Ireland." This sub-section would have made it compulsory for the Board to acquire the defendant's undertaking if it had not been for the limited scope given to the word " operated " by the definition contained in the sub-section : " In " this sub-section the expression ' operated ' means " operated immediately before the passing of this " Act and then providing a road transport service " *which had been commenced before the first day of* " *June, nineteen hundred and thirty-four.*" The effect of this sub-section, with its definition of the word " operated," is that the Board can only acquire road motor undertakings commenced before 1st June, 1934, and they have no power to acquire the defendant's undertaking. Section 6 provides for the payment of " consideration " to the owners of undertakings transferred, so that an undertaking commenced on 31st May, 1934, must be acquired and consideration paid for it, while one commenced on the 1st June, 1934, cannot be acquired and consequently the owner can receive no consideration. The use of the word " consideration " and not " compensation " has been adverted to in this Court in previous cases, but nothing turns on this in the

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present case. The words are synonymous so far as the right to compensation is concerned though they may suggest different measures when an undertaking comes to be valued.

What becomes of this undertaking commenced after 31st May, 1934? The Board claim that it can no longer be carried on having regard to section 15 (1), which provides that "a person other than the Board "shall not use a motor vehicle on any public highway "for the conveyance of passengers or their luggage or "the carriage of merchandise for hire or reward, "except with the consent in writing of the Board and "the approval of the Ministry of Home Affairs." This sub-section is implemented by sub-section (6), which provides that: "If any person uses a motor "vehicle in contravention of this section, he shall be "liable on summary conviction to a fine not exceeding "one hundred pounds." It is under these two sub-sections that the present proceedings were instituted, and the defendant, who is admittedly not entitled to compensation, defends himself by saying that they are *ultra vires* in that they compel him to abandon his business without compensation. If he is right in this contention there can be no doubt that he is entitled to rely upon it as a defence to the prosecution.

Some uncertainty was expressed during the argument before us as to whether the defendant complained of the provisions of section 5 or of section 15, but I think it is quite clear that section 15 is the one which injuriously affects him. It was urged by counsel for the Board, and the Attorney-General to some extent adopted this argument, that section 15 does not put an end to the defendant's undertaking absolutely, as he could carry it on with the consent of the Board and the approval of the Ministry of Home Affairs. In fact such consent was issued to the defendant in August, 1935, apparently pending an investigation of his claim, but the Board having found out that the undertaking did not come within the provisions of section 5 revoked the consent by letter, dated 1st April, 1937. The defendant, nevertheless, continued to carry on his business and on 29th April, 1937, the Board

purchased his motor lorry for £430 which was paid to the hirers, this sum being the amount outstanding in respect of their hire-purchase charges. How the Board came to make this purchase of the tangible assets of this one lorry undertaking which was outside the provisions of section 5 does not appear. They were aware when they did so that section 5 did not apply to the undertaking, but they may have thought that the case was a hard one and that if they relieved the defendant of his liability for the balance of his hire-purchase instalments he would have been content. Counsel for the Board further suggested that the defendant compromised his legal rights in some way when he sold his lorry to the Board, but this was not pressed, and it was not shown that this sale had any effect on the defendant's right to carry on his undertaking. At the most it could only amount to an admission that he then thought the Board could effectively prevent him using the highway under section 15 (1), and that the withdrawal of their consent to his carrying on his undertaking had this effect. But he may also have made this sale without any thought or knowledge of his legal position or in the hope that in some way he was going to be compensated for his loss of goodwill, or it may have been a sale unconnected with the Act. The sale was an open sale without any conditions and was, in my opinion, an equivocal act which raises no estoppel against him. The defendant, perhaps after getting legal advice, was not content to abandon his undertaking, and he acquired another lorry and continued to trade. This was clearly contrary to the provisions of section 15, and if that section is *intra vires* he should have been convicted. The Resident Magistrate who heard the case, however, decided that section 15 is *ultra vires* the Parliament of Northern Ireland, and on appeal the Deputy Recorder affirmed his decision but stated this case for the opinion of the Court.

This brings me back to section 5 of the Government of Ireland Act, 1920, but, before considering that section in detail, I will recapitulate some matters which must be borne in mind while doing so. It has

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been established that "goodwill" is property, that the defendant was possessed of a "goodwill" attached to his undertaking, and that this "goodwill" had a value which can be ascertained. Further, this business has been terminated by the provisions of section 15 (if this section is valid) without compensation being paid for the goodwill. It was suggested that the undertaking was not terminated and that it can still be carried on, as it was for an interim period, if the Board and the Ministry of Home Affairs consent under section 15 (1), but I reject this argument entirely. I have yet to learn that when a citizen carries on a business at his own will and pleasure, such business can be said to continue to exist when he carries it on by leave and licence and at the arbitrary will of some other person or persons. He certainly could have no property in such business, nor a goodwill to which any value could be assigned, and if any evidence of the truth of these propositions be necessary it is supplied by the Board's argument in this case that the defendant's undertaking ceased to function in law when the consent given under section 15 was withdrawn. This section was obviously drafted for the convenience of the Board and not as a relief or sop to those whose undertakings were about to be taken over, and still less to those who could not be taken over because the Act did not apply to them. I hold, therefore, that if section 15 is *intra vires* it put an end to the defendant's undertaking and goodwill absolutely and without compensation, and that Parliament has expressed this intention in unequivocal terms.

On these facts, was the defendant's property "taken" without compensation ? The Board and the Attorney-General contended that the mere extinguishment of the defendant's undertaking does not amount to taking it within the meaning of section 5 of the Government of Ireland Act, 1920. They argued that "take" means take by way of transfer and that the property must be actually taken possession of and used under the statute that is challenged to make it *ultra vires* under section 5, and that to forbid a man to carry on his business is merely a prohibition and not a taking.

I refuse to place any such restriction on the section, which says that the Parliament of Northern Ireland shall not make a law so as either *directly or indirectly* to *take* any property without compensation. If this section only contemplates a taking by way of transfer and actual possession the word *indirectly* would appear to be superfluous, but I am satisfied that the Legislature in section 5 was looking at the taking from the point of view of the person deprived of his property and endeavouring to protect him, while the argument addressed to us is based on a grammatical construction of the words of the offending statute, claiming that construing them strictly there is no "taking." This overlooks the reality of the transaction by which the defendant has been dispossessed of his undertaking, which indeed is admitted, but is sought to be justified by saying that though it has been put an end to it has not been "*taken*." If this is right, death by misadventure would seem to be the appropriate verdict. But we are not driven to adopt this grammatical construction of the word "take." Standing by itself the word is ambiguous and unless it be used with a qualifying adverb or in conjunction with some object, it is impossible to give it a precise meaning. For example, it may mean "take over" suggesting a transfer of possession, or it may mean "take away" signifying to dispossess or confiscate, or it may connote mere destruction as when the highwayman says: "Your money or your life," meaning, "Give me your "money or I will take your life." Shakespeare uses the word in all these senses when Shylock says: "You take my house when you do take the prop "that doth sustain my house. You take my life when "you do take the means whereby I live." It is not clear in what sense the word is used in section 5 of the Government of Ireland Act, 1920, but it may be used in a general sense and may mean any act which deprives or dispossesses a citizen of his property, or which merely destroys it, as well as those acts which transfer his property to the state or to others. In order to ascertain its true meaning I think we must look for the intention of Parliament in so far as we can gather it from the

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Act itself and from the common law which Parliament must be presumed to have been aware of, and to give the word "take" a meaning which will carry that intention into effect. In my view the intention of Parliament was a general one, to protect the subject from possible spoliation. The mischief aimed at is the expropriation or confiscation or destruction of any property without compensation, and the section should therefore be liberally construed so as to give the utmost protection which the language used will allow. Construing the word in this way, I hold that the word "take" means what it says and is effectual to prevent the defendant's undertaking being closed down under section 15 without compensation.

It has for long been a canon of construction of statutes "that an intention to *take away* the property "of a subject without giving to him a legal right to "compensation for the loss of it is not to be imputed "to the Legislature unless that intention is expressed "in unequivocal terms"—*Central Control Board (Liquor Traffic) v. Cannon Brewery Company Ltd.* (1), per Lord Atkinson, at p. 752—and the construction I have put upon section 5 of the Government of Ireland Act, 1920, makes the prohibition therein contained co-extensive with this canon of construction, which I believe was the intention of the Legislature. And there is authority for the proposition that in doubtful cases of construction statutes ought to be construed according to the reason of the common law. To take an example referred to during the hearing: it was suggested that it would be within the powers of the Parliament of Northern Ireland to close all public houses and enforce prohibition. This would, I think, be within Parliament's power to legislate under section 4 of the Government of Ireland Act, 1920, for the peace, order and good government of Northern Ireland, but I am far from being satisfied that such prohibition could be legally enacted by Parliament without providing for compensation. The extinguishment of licences would no doubt be necessarily incidental to the enforcement of total abstinence, but extinguishment

(1) [1919] A.C. 744.

without compensation would not, and if such extinguishment amounts in law to a taking of the property of the licensees it would be subject to the provisions of section 5, which says that compensation must be made, and in this connection I may perhaps recall that when Parliament abolished the spirit grocers' licences by the Intoxicating Liquor Act (Northern Ireland), 1923, it provided by section 3 for compensation to be paid to all those who were dispossessed. The same or similar provision for compensation is made by the Act we are dealing with for all those whose road motor undertakings are taken over, though, if the argument I am dealing with be correct, they could have been prohibited from carrying them on without any compensation. I refrain from giving any decision on a matter outside this case, but I may say that as at present advised I cannot see any difference in principle between an act closing all licensed houses and section 15 of the Road and Railway Transport Act (Northern Ireland), 1935, which extinguishes all road motor undertakings.

Difficulties may hereafter arise in reconciling the general legislative powers of Parliament conferred by section 4 with the restrictions contained in other sections of the Government of Ireland Act, 1920. In some cases the conflict may be one of principle only, while in others it may be one of degree. The case I have already referred to may supply an example illustrating the distinction. If Parliament instead of enacting total prohibition were merely to shorten the hours during which licensed premises can remain open, without making compensation, as it did by section 1 (1) of the Intoxicating Liquor Act (Northern Ireland), 1923, which prohibits selling intoxicating liquor or keeping open any premises for such sale on Sunday or Christmas Day, could this be said to be a taking of property within the meaning of section 5 of the Government of Ireland Act, 1920? It has never been suggested that compensation should have been made for such restriction in the hours of trading, and that may possibly be because it has been recognised that the trade has not been taken and that the

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restrictions were incidental to the main objects of the Act, namely, the regulation of licensed premises and the enforcement of peace, order and good government; but I express no opinion as to this, or as to whether, and, if so, when compensation must be made for interference with, or partial taking of, any property.

What becomes of the undertaking after it has been taken from the defendant is a matter in which he has no interest, and whether it ceases to exist, or by the general machinery of the statute becomes the property of the Board, does not concern him. All he knows is that it has been taken from him without compensation and that his state is the same as if he had conveyed it to the Board for natural love and affection, and in my opinion it was so taken within the meaning of section 5 of the Government of Ireland Act, 1920. But Mr. Chambers has pointed out with much force that on the argument of the Board the defendant's property has not been destroyed. It is still potentially in existence and has passed to the Board. All that has happened is that the defendant can no longer operate his lorry and secure for himself the proceeds of his goodwill. But presumably his clients and customers are still there ready to dispatch their goods and to pay the necessary charges, and the only persons who can accommodate them are the Board who alone can operate this undertaking. This argument has satisfied me that even if I have fallen into error in construing the word " take " in section 5 of the Government of Ireland Act, 1920, the defendant's property has been taken in the sense contended for by the Board and the Attorney-General, for by the machinery of the statute it is there ready for the Board to lay their hands on if they succeed in this prosecution, whereupon I imagine the defendant's old lorry or some other lorry belonging to the Board will proceed on to the defendant's route, secure for the Board his clients who will then have no alternative means of transport, and will be paid by them the £8 or £9 a week which the defendant now earns for himself. This is what must have happened in the case of all those undertakings which have been acquired and in respect of which

compensation for goodwill has been paid. In these cases I imagine there can have been no actual transfer of goodwill. A formal transfer was unnecessary. The Board acquired the undertakings under section 5 and by taking possession of the tangible assets, while the goodwill was secured to them by section 15 which gave the Board a monopoly of all road motor transport services. By this means the owners of the various undertakings lost their goodwill which was, as it were, picked up by the Board though they acquired it through the machinery of the statute as effectively as if it had been conveyed to them.

In my opinion, therefore, the defendant's property was taken without compensation within the meaning of section 5 of the Government of Ireland Act, 1920, and the Deputy Recorder was right in holding that section 15 of the Road and Railway Transport Act (Northern Ireland), 1935, is *ultra vires* the Parliament of Northern Ireland in so far as it purports to prevent the defendant from plying his trade on the public highway. The cases decided under the Lands Clauses Consolidation Act, 1845, in which it was held that take means take actual possession of—See *R. v. Manley Smith, Re Church & London School Board* (1)—have in my opinion no application to the present case. The Lands Clauses Acts deal with land, whereas section 5 of the Government of Ireland Act applies to all kinds of property, some of which cannot be taken in the sense in which the word has been construed under the Lands Clauses Acts. The present case affords an example of such property. Parliament can prohibit the defendant from using the highway, thereby destroying his goodwill, but this goodwill is personal to the defendant based on the hope and expectation that his customers will continue to patronise him and use his vehicle; and as these customers cannot be coerced he has nothing that can be taken possession of directly. This goodwill is, nevertheless, property and can be destroyed in the defendant's hands, and if it is then picked up by another haulier this would I think amount to indirectly, if not directly, taking

(1) [1892] 67 L.T. 197.

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possession of it, and, therefore, within the meaning assigned to the word "take" by the Board's counsel and the Attorney-General, but, as I have already said, I cannot understand how, when the defendant has lost his property, the right to compensation secured to him by the Government of Ireland Act depends on whether it is, either at the time he loses it or subsequently, taken possession of by someone else. Another example of property being *taken away* and rendered useless but not taken possession of is to be found in *London & North Western Railway Company v. Evans* (1). The dispute in that case arose under a private Act which authorised certain navigation works in a tributary of the Mersey. Under this tributary there was coal which the defendant worked so as to cause a subsidence. The Railway Company, in whom the navigation undertaking had become vested, brought an action for an injunction on the ground that they had a right to support, which, if established, would have rendered the coal mines unworkable, and the defendant maintained that as no compensation was paid or provided for, the legislature could not have intended the plaintiffs to have any right of support. The Court of Appeal held that the private Act provided means of obtaining compensation for the loss occasioned by the defendant by having to leave support and that therefore the legislature must be taken to have intended to give such right. Bowen, L.J., at p. 28, treats the liability to provide support as in effect a confiscation of the defendant's property though it was only a liability not to let down the support and there was nothing that could be said to pass into the possession of the owners of the navigation, and, if it was a fact, as estimated by the engineer for the defendant, that the value of the coal that would have to be left to provide the support was £144,000, I think his property was taken away or confiscated or destroyed, as you please, and he most certainly lost it as a result of the Act of Parliament.

It was suggested by the Board at one stage of the argument that, the object of this Act being the pro-

(1) [1893] 1 Ch. 16.

vision of a unified system of motor road and railway transport, which is a matter within the powers of the Government of Northern Ireland, any interference with the rights or property of citizens which might be incidental to the effectual carrying out of this object is *intra vires*, though it might otherwise be in conflict with section 5 of the Government of Ireland Act, 1920. This argument was not pressed and I only refer to it now in connection with some observations which I propose to make upon section 5 of the Road and Railway Transport Act (Northern Ireland), 1935. As I have said, it was faintly argued that the damage done to the defendant was incidental to the main provisions and the objects of the Act and that it was necessary to limit the undertakings to be taken over to those which had been commenced before 1st June, 1934, for otherwise there would have been a flood of new undertakings started with a view to getting compensation.

I have already dealt with the practical side of this suggestion as it affects the merits of defendant's case, but I have no doubt that it was the fear of such mushroom undertakings springing up that induced the Legislature to limit the transfer of undertakings to those commenced prior to that date, the effect of which taken along with section 15 is to extinguish undertakings commenced subsequently without compensation for goodwill. And if in order to attain the main objects of the Act it had been necessary to do this, it might very well have been lawful notwithstanding the provisions of section 5 of the Government of Ireland Act, 1920. *Gallagher v. Lynn* (1). But a legislature legislating in a matter over which it has express power cannot encroach upon fields which are forbidden, even incidentally, unless such encroachment is necessary and the main objects of the permitted legislation cannot be otherwise achieved. This cannot be said to be so in the present case.

The main objects of the Road and Railway Transport Act (Northern Ireland), 1935, could have been attained without limiting the acquisition of undertakings to

(1) [1937] A.C. 863.

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those commenced after 1st June, 1934. If this provision had been omitted a little more money might have had to be expended and the defendant and possibly a few others would have been compensated for their goodwill, but that would have been the only result and it would not have affected the main provisions of the Act. Moreover the fears of the Legislature could have been allayed by the introduction of a preliminary Act prohibiting the commencement of new undertakings as from its date ; and there may be other ways in which the starting of new undertakings could have been provided against. All that I wish to point out is that it was not necessary to limit section 5 to undertakings commenced before 1st June, 1934, thereby excluding subsequent undertakings from the compensation provided by section 6.

The issue is one of principle and I think one simple test will show that the method adopted by the Legislature of limiting the transfer and compensation provisions of the Act to those undertakings commenced before 1st June, 1934, must be wrong. Suppose Parliament had gone back two or three or more years and excluded from the operation of the Act all undertakings commenced after the date elected. Could it be said that this would be within its powers ? And if not, where is the line to be drawn ? The goodwill in the undertakings would be extinguished or destroyed by such provision and the only answer suggested by the arguments addressed to us is that this would be within the powers of the Parliament of Northern Ireland provided that the statute did not purport to transfer the goodwill to the Board. If this be correct in principle, it appears to me to follow that a large number, if not all, of the concerns which have been taken over under this Act and whose owners have been compensated could have been extinguished without compensation of any kind. It was on this aspect of the case that I was anxious to hear the Attorney-General. I thought that he might possibly have been able to show us that it was necessary to limit section 5 of the Act to undertakings commenced before 1st June, 1934, because then the injury to the defendant

might be justified as being necessarily incidental to the main objects of the Act, but the Attorney-General did not pursue this topic, and I am satisfied that the section was drawn in this form for convenience and not as of necessity ; and I can well understand that Parliament may have thought it unlikely that there could be any property in a business commenced after 1st June, 1934, though unfortunately that assumption is now negatived by the findings in this case.

I entertain no doubt as to the right of the Court to invite the assistance of the Attorney-General. This is a case between subjects involving the validity of a public Act of the realm, and, as it raises questions of general public importance, the Court is entitled, if not bound, to enquire what attitude the Crown takes up with regard to them ; and I am further of the opinion that the Attorney-General is entitled to intervene as of right in any case if it is brought to his notice that questions of a public nature are involved, subject always to the right of the Court to rule whether this be so or not.

The only remaining matter to which I will refer is the case of *France Fenwick & Co., Ltd. v. The King* (1), relied on by the Attorney-General in support of his argument that the defendant's property was not *taken*. In my view the case is not an authority for this proposition. The facts are entirely different from those in the present case, the net issue being whether an order not to discharge a vessel without permission amounted to a requisition or taking possession of the ship under Regulations which provided for the payment of compensation in respect of any property requisitioned or taken possession of under them. Lord Wright (then Wright, J.) held that on the facts there was no taking possession or requisition. An alternative claim was put forward that the suppliants were entitled to compensation at common law in respect of the deprivation of the use of the ship, an intention to take away property without compensation not to be imputed to the legislature unless it is expressed in unequivocal terms. As to this Lord Wright

(1) [1927] 1 K.B. 458.

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says at p. 467: "I shall assume that the Crown has "no right at common law to take a subject's property "for reasons of State without paying compensation. "I think, however, that the rule can only apply (if it "does apply) to a case where property is actually "taken possession of, or used by, the Government, "or where, by the order of a competent authority, it is "placed at the disposal of the Government. A mere "negative prohibition, though it involves interference "with an owner's enjoyment of property, does not, "I think, merely because it is obeyed, carry with it "at common law any right to compensation."

In the present case the prohibition against taking a subject's property without compensation depends upon statute and is free from doubt, but this passage is cited for the proposition that, whether it be under the common law or by statute, the right to compensation only arises when the property is actually taken possession of or used by the Government. I do not think that Lord Wright intended to lay down any such general rule. He discussed the application of the general common law principle to the facts of the case with which he was dealing, and, assuming the common law rule to be as stated, held that it did not apply because the property in question was neither requisitioned nor taken possession of. The last paragraph of the passage I have cited appears to me to make this tolerably clear, and, as I read this judgment, Lord Wright does not say that in order to constitute a taking the property must be transferred into the hands of the receiver, but that there can be no taking when the property remains with the owner and the interference with it arises under an order for detention which does not amount to a requisition or taking possession of such property.

The Deputy Recorder was, in my opinion, right in holding that Section 15 of the Road and Railway Transport Act (Northern Ireland), 1935, is *ultra vires*.

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MURPHY, L.J.: This was a case stated for our decision by the learned Deputy Recorder of Belfast who had heard an appeal by the Northern Ireland Road

Transport Board (to whom I shall refer as the Board), against the dismissal of a summons brought by the Board against Albert Benson (to whom I shall refer as the defendant). The defendant had been summoned by the Board for using a motor vehicle for hire or reward on a public highway contrary to section 15 of the Road and Railway Transport Act (Northern Ireland), 1935, (to which I shall refer as " the Act "). From the facts found it appears that the defendant on or about 11th June, 1934, acquired a lorry and commenced business as a haulier. He soon built up a substantial business and had a goodwill of value. He was carrying on this haulage business on 16th July, 1935 (the date of the passing of the Act), and is still carrying it on. The Board in August, 1935, issued a consent in writing (under section 15 (1) of the Act) to the use by the defendant of motor vehicles for the carriage of merchandise for hire or reward : this was approved by the Ministry of Home Affairs but was revoked by letter of 1st April, 1937, as the Board had ascertained that the defendant's business was not a road motor undertaking within the meaning of section 5 of the Act. This section, which *required* the Board to " acquire every road motor undertaking *operated* " for hire or reward in Northern Ireland," defines " operated " as " operated immediately before the " passing of this Act and then providing a road " transport service *which had been commenced* before " *the 1st day of June*, 1934." It was agreed that these latter words excluded this " undertaking," which, as already stated, had been started by the defendant on 11th June, 1934. On 29th April, 1937, the Board by agreement purchased the defendant's lorry for £430—this transaction, it was admitted, was not effected under the powers of " acquisition " conferred on the Board by the Act. The circumstances under which this second-hand lorry was purchased were not in evidence ; it may have been a surprise to the Board when they ascertained that the defendant had obtained another lorry and continued his business. It was agreed that on the date named in the summons the defendant was using his lorry (or lorries) on a public

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highway without the consent of the Board for the carriage of merchandise for hire or reward. He was, therefore, *prima facie*, liable to the penalty prescribed by section 15 of the Act for doing so. His answer to the charge was that section 15 of the Act was (so far as he and any others in like case were concerned) *ultra vires* the Parliament of Northern Ireland, as, by prohibiting the carrying on of his "undertaking" without compensation, this section amounted to a "taking" of his property without compensation, and was, therefore, within the prohibition contained in section 5 of the Government of Ireland Act, 1920. The Resident Magistrate dismissed the summons, and the Deputy Recorder held that this decision was right but stated a case for our determination.

When the arguments concluded we were of opinion that, having regard to the importance and difficulty of the questions involved, we required further assistance, and we intimated that we should ask the learned Attorney-General to argue the several points which had emerged in the course of the argument. No objection to this course was made by counsel on either side. On a later date the Attorney-General attended in our Court, and in the presence of counsel for the Board and the defendant, we stated to the Attorney-General the questions on which we desired his assistance and a day was arranged for the further hearing. Counsel for the defendant intimated that he would desire to reply to the Attorney-General's argument, to which the Court assented. On 16th April, when the argument was resumed, Mr. Chambers on behalf of the defendant for the first time submitted that the Attorney-General should not be heard as there was no Rule which would entitle him to intervene. I am clearly of opinion that the Court was entitled to obtain the assistance of the Attorney-General. The Attorney-General referred to a number of Canadian appeals in which it appeared that on questions of *ultra vires* (as applied to Dominion or Provincial Statutes) the Attorney-General for Canada or for some province of that Dominion had intervened and I notice that in a case recently before the Privy

Council, *Moran Proprietary Ltd., Appellants, v. Deputy Commissioner of Taxation for New South Wales, Respondent* (1), the Attorney-General for each of four States intervened on a question affecting federal taxation. He also referred to the Erne Fishery case, *Moore v. Attorney-General for the Irish Free State* (2) in which the Attorney-General for England appeared before the Privy Council " by invitation to assist the " Board," while in *O'Neill v. Northern Ireland Road Transport Board* (3), the Attorney-General for Northern Ireland argued the case not merely on behalf of the Tribunal but also by virtue of his office as Attorney-General. In my opinion not merely is the Court entitled to request the Attorney-General to appear and to assist them, but in a case where a question arises as to the legality of a statute of Northern Ireland, the Attorney-General by virtue of his high office and as a person responsible for the proper administration of justice, would be *entitled* to intervene at any stage. The right of the Court to invite him to intervene is in my opinion inherent in the Court, and the Attorney-General's right to intervene is also inherent in his high office. The argument of the learned Attorney-General completely satisfied me that (*a*) the question whether or not an Act of the Northern Ireland Parliament was *ultra vires* the legislature can be raised in any Court, and (*b*) that this question can be determined *inter partes* and although the Attorney-General is not represented. The Attorney-General also argued that when the question was whether or not a statute was *ultra vires* the legislature of Northern Ireland on the ground that it enabled property to be taken without compensation (section 5 of the Government of Ireland Act, 1920), it was not relevant to consider the " pith and substance " or the " true " nature and character " of the particular statute. Having regard to the opinion which I have formed on the main question argued by him it is not necessary for me to express an opinion on this branch of his most interesting argument.

(1) [1940] W.N. 223.
(2) [1935] A.C. 484.
(3) [1938] N.I. 104.

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On the last, which is the main question submitted to him, the Attorney-General quoted authorities which established that goodwill had been held to be "property" (a) within section 59 (1) of the Stamp Act, 1891 (*Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (1)), (b) for purposes of Estate Duty (*Attorney-General v. Boden* (2)), (c) within the wording of a debenture (*In re Leas Hotel Co.* (3),) and under section 55 of the (English) Bankruptcy Act, 1914. It had been admitted by counsel for the Board that goodwill was "property" within section 5 of the Government of Ireland Act, 1920, and I entertain no doubt that goodwill does come within the meaning of "property" in that section. The last question is, therefore: has the combined effect of sections 5 and 15 of the Act been to "take" the "property" (goodwill) of the defendant without compensation? I agree with the Attorney-General that if the Act enabled the Board so to "take" the defendant's property, the Statute would be open to the same objection as if it authorized the Government of Northern Ireland to "take" it. The Attorney-General on this branch of his argument referred to the judgment of Wright, J. (as he then was) in *France Fenwick & Co., Ltd. v. The King* (4), and submitted that legislation which forbade the carrying on of a business is *not* legislation "taking" the business. The relevant passage in the judgment of Wright, J., is at page 467 of the report: ". . . . but "I shall assume that the Crown has no right at common "law to take a subject's property for reasons of State "without paying compensation. I think, however, "that the rule can only apply (if it does apply) to a "case where property is actually taken possession of, "or used by, the Government or where by the order "of a competent authority it is placed at the disposal "of the Government. A mere negative prohibition, "though it involves interference with an owner's "enjoyment of property does not, I think, merely "because it is obeyed, carry with it at common law "any right to compensation." In considering this

(1) [1901] A.C. 217.
(2) [1912] 1 K.B. 539.
(3) [1902] 1 Ch. 332.
(4) [1927] 1 K.B. 458.

question it is to be observed that section 15 does not impose an *absolute* prohibition on the carrying on of such a business as that of the defendant. The carrying on of the business is only prohibited if the consent of the Board is not obtained, and the defendant did obtain such a consent and carried on his business under it from August, 1935, to April, 1937. Furthermore, the defendant might continue to use his lorry for the purposes enumerated in section 15 (4) and (5), while he could also use it for the carriage of his own goods. In *Attorney-General for Ontario v. Attorney-General for Canada* (1), Lord Loreburn at page 583 says: "It cannot be too strongly put that with the wisdom "expediency or policy of an Act *lawfully passed* no "Court has a word to say." As so much stress was laid in argument on the unreasonableness of excluding from section 5 undertakings commenced after 1st June, 1934, it may, however, be observed that the Act was passed on 16th July, 1935, that a period of six months from that date was contemplated as the normal period for the acquisition of undertakings under section 5, and that the undertakings which were not included under section 5 were those which had sprung up within a period of thirteen and a half months before the process of acquisition commenced. Mr. Chambers on behalf of the defendant argued that the effect of sections 5 and 15 of the Act was to "take "away" the defendant's goodwill and to vest it in the Board, and as this "taking away" was to operate without compensation to the defendant, such part of the Act as affected the defendant's property (goodwill) was *ultra vires*. I have summed up Mr. Chambers's argument in this way as it is against the *combined* operation of sections 5 and 15 of the Act that he complains. He also argued that the "pith and "substance" of the Act was to effect the absorption of all those who were operating transport undertakings by the Board. I do not think that he has proved that the goodwill of the defendant and of those who had started to operate transport undertakings since June 1st, 1934, (the Court was informed that there were

(1) [1912] A.C. 571.

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about twelve of such operators', would pass to or be acquired by the Board if, under the provisions of section 15, they ceased to operate such undertakings. The Act no doubt created a *partial* monopoly of road transport, but this was clearly not a complete monopoly; any person who had formerly consigned merchandise by the defendant's lorry could in the future consign his merchandise by rail or, should he elect to do so, purchase a lorry for his own business, while, if a farmer, he might consign his stock or crops by the lorry of a neighbouring farmer—section 15 (3). While the Board under the provisions of the Act have paid "consideration," or compensation, for the goodwill as well as for the physical assets of the undertakings which they were bound to acquire under section 5, this certainly did not mean that the existing "goodwill," or business connexion, was in fact obtained by the Board, for it is notorious that a large part of this "goodwill" ceased to exist after the undertakings had been acquired by the Board. While, therefore, it is possible that some part of the goodwill of the defendant might pass to the Board if the defendant ceased to operate his undertaking, I should regard this merely as a possibility. Is it then to be said that if the defendant is prohibited under section 15 from using his lorry as he has been using it for the purpose of his transport undertaking, and if he, therefore, loses the goodwill of this undertaking, such a limited prohibition, coupled with the possibility that some part of the "goodwill" of the defendant *may* pass to the Board, constitutes a "taking" of this goodwill within the meaning of section 5 of the Government of Ireland Act, 1920? I do not think that there will be such a "taking" and, although the general proposition enunciated by Wright, J., must be considered in the light of the facts of the case then before the learned Judge—which, of course, differ markedly from those of the present case—I am of opinion that in this case section 15 of the Act amounts to "a negative prohibition" involving interference with the defendant's enjoyment of his property and that this does not amount to a "taking" of property within the meaning

of that word in section 5 of the Government of Ireland Act, 1920.

It occurred to me during the hearing of the appeal that if the argument on behalf of the defendant is sound, any legislative interference by the Parliament of Northern Ireland with the hours during which licensed premises might remain open for the sale of intoxicating liquor would be a "taking of goodwill" and, if compensation were not provided, would be *ultra vires*. I do not think that a sufficient answer to such an analogy is to be found in the argument that such licensing legislation would merely *abolish* part of the goodwill and that such part of the goodwill would not be transferred to any other person or Board.

For these reasons I am of opinion that the provisions of sections 5 and 15 of the Act are not *ultra vires* qua the defendant.

I have not thought it necessary to express an opinion on the interesting question whether an Act admittedly *intra vires* the Parliament of Northern Ireland so far as it affected the very large number of undertakings acquired under section 5 could be held to be *ultra vires* so far as it affected the very limited number of undertakings which began to be operated after 1st June, 1934.

Since writing this judgment I have had an opportunity of reading the judgment which has just been delivered by the Lord Chief Justice. I agree with this judgment and should have been content to say so and add nothing, but as the question is one of considerable importance, and as Babington, L.J., has come to the opposite conclusion, I have thought it desirable to add my opinion.

Solicitor for the complainants: *J. Dunville Coates.*
Solicitors for the defendant: *Wallace, Harris & Robb.*

M.W.G.

Ch.D.
1940.

April 29.

McHUGH, Appellant; MINISTRY OF LABOUR FOR NORTHERN IRELAND, Respondents.

National Health Insurance—National Health Insurance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 32), *section* 161—*Widows' pension—Bookmaker's clerk employed in both legal and illegal betting business—Whether an "insured person"—National Health Insurance Act*, 1936, *sections* 1 *and* 2, *and First Schedule, Part I.* (*a*)—*Widows', Orphans' and Old Age Contributory Pensions Act* (*Northern Ireland*), 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 32), *section* 2.

By sec. 3 (1) of the Widows', Orphans' and Old Age Pensions Act (Northern Ireland), 1936, the widow of a man who was insured at his death under the National Health Insurance Act, 1936, is entitled to receive a widow's pension. Sec. 1 of the National Health Insurance Act, 1936, provides that all persons who are "employed "within the meaning of the Act" shall be insured. The persons employed within the meaning of the Act are (sec. 2 (1)), "persons "engaged in any of the employments specified in Part I. of the First "Schedule of the Act," which defines "employments within the "meaning of the Act" as including "Employment under any "contract of service."

The deceased husband of the appellant had been employed for six and a half years immediately prior to his death as a clerk in a bookmaker's office. The business included both cash and credit betting. The deceased also did some overtime clerical work for his employer at his own residence, for which he was paid 7/6 weekly. He was insured under the National Health Insurance Acts at the date of his death. The claim by the appellant for a widow's pension under the Widows', Orphans' and Old Age Contributory Pensions (Northern Ireland) Act, 1936, was dismissed by the Ministry of Labour for Northern Ireland. On appeal to the High Court under the National Health Insurance Act, 1936, section 161,

Held, by Megaw, J., that the basis of the contract of employment was that the duties of the deceased should involve the conduct of cash betting business in a "place" devoted to that business, contrary to the Betting Act, 1853, secs. 3 and 4, that the deceased man's employment was not employment under any contract "of "service" within the meaning of the National Health Insurance Act, 1936, and that the appellant was not entitled to such pension.

The facts appear in the judgment.

Sheil, for the appellant :—

The appellant is entitled to a pension in respect of the employment of her deceased husband on two grounds :

(1) In respect of his employment as a bookmaker's clerk. Though his employment as such may be tainted, in view of the fact that he actually assisted in the illegal part of the business, it does not necessarily follow that the contract of service was illegal. The contract of service did not stipulate for the performance of any illegal act by McHugh and was capable of performance without any infringement of the law. The case is the same as *Fegan v. Department of Health for Scotland* (1).

(2) In respect of his clerical employment at home. This work was entirely distinct from his employment as bookmaker's clerk. He had in fact two employments and received a separate remuneration in respect of each. Had he not performed these clerical duties some one else would have been employed to perform them.

Black, *A.-G.*, and *Dougherty* for the Ministry of Labour for Northern Ireland :—

The appellant's second contention is unsustainable. The clerical work is described in the affidavits as "overtime," and not as a separate employment. This clerical work consisted of typing result sheets and lists of horses running. Such work is specifically excluded from the operation of the Act by the First Schedule, Part VII., to the National Health Insurance (Subsidiary Employments) Order (Northern Ireland), 1938, made in pursuance of powers conferred by paragraph (*m*) of Part II. of the First Schedule to the National Health Insurance Act, 1936.

The employment as a bookmaker's clerk is not an employment within the meaning of the Act. Where a contract of employment is forbidden by statute, or where the intention is that the contract should be carried out in such a way as to infringe the law, it has

(1) 1935 S.C. 823.

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been repeatedly held in Workmen's Compensation cases that the workman is not entitled to compensation. *Kemp v. Lewis* (1) and *Pounteney v. Turton* (2), illustrate how far this rule has been applied. These pensions are in a large measure contributed to out of State funds, as appears from the Widows', Orphans' and Old Age Contributory Pensions (Northern Ireland) Act, 1936, sections 12, 13 and 14. The carrying on of such a cash betting business as this is a criminal offence under the Betting Act, 1853, sections 3 and 4. It would be startling to find that State funds were being devoted to the provision of a pension for the widow of a man who assisted in carrying it on.

Fegan v. Department of Health for Scotland (3) ought not to be followed. The dissenting judgment of Lord Fleming is almost coercive in its reasoning. Here, as in that case, the intention was that the work should involve the commission of illegal acts, and illegal acts were in fact committed. It is difficult to appreciate the decision of the Scotch Court that the contract in such circumstances was legal. The contract of service in the present case was not intended to be performed without a breach of the law; and its performance almost of necessity involved illegality. I submit that in such circumstances the contract of service was not for a legal purpose.

Cur. adv. vult.

Megaw, J.

Megaw, J.: This was an appeal from a decision of the Ministry of Labour for Northern Ireland in respect of a claim made by one Mrs. Kathleen McHugh, of Omagh, the Ministry having decided that her deceased husband was not an employed person within the meaning of the National Health Insurance Act, 1936.

The appeal comes before me under the provisions of section 161 of the National Health Insurance Act, 1936, to decide whether the determination of the Ministry of Labour on the question whether a bookmaker's clerk is an "insured person" under section 2 of the Widows', Orphans' and Old Age Contributory

(1) [1914] 3 K.B. 543.
(2) 34 T.L.R. 103.
(3) 1935 S.C. 823.

Pensions Act (Northern Ireland), 1936, is correct. The facts relevant to the issue were as follows :—The deceased Robert McHugh had been employed for six and a half years by Wm. F. Townsend, of Omagh, described as a "commission agent," which seems to be a euphemism for the more generally descriptive term "bookmaker." His engagement was weekly and was a whole time employment. His remuneration was £2 weekly ; but in addition the claim set out that he had also 7/6 per week for overtime work done at the employee's own residence, typing result sheets, etc. In the claim the nature of his duties was described as "clerical work in employer's office, answering telephone "calls, taking credit bets and entering them in the "books at Enniskillen office, and also took cash bets "at such office. He, when first employed, worked in "one of Mr. Townsend's offices in Omagh." His employer had full control as to the method of performance of his duties, and orders and directions to him were given by his employer. Deceased was insured under the National Health Insurance Acts.

Particulars of the employment were given by the deceased's employer, in which he stated that the deceased managed his Enniskillen office, that "the "business was mostly small cash bets, and in which "he was the only clerk employed for over four years," and that "although there would be more cash work, "the amount involved in the credit side of the business "would be greater." Mr. Townsend added that "when working in Omagh McHugh merely worked "in the cash side of the business. Throughout the "full period of six and a half years McHugh also typed "the lists of the next day's runners for posting in the "premises and was paid 7/6 per week for this work. "He furnished the credit bets accounts at the end of "each week."

Such being the facts, the question for determination is whether there existed such a contract of service between the deceased and Townsend as brought the deceased into the category of "insured person" within the scope of the First Schedule of the National Health Insurance Act, 1936, and consequently entitled his

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widow to the benefits of the Act. In the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936, the expression "insured" means insured under the National Health Insurance Act, 1936; and in section one of the last-mentioned Act the meaning of "insured persons" is expressed as :—

"Subject to the provisions of this Act, all persons "of the age of sixteen and upwards who are employed "within the meaning of this Act shall be, and any "such persons who are not so employed but who "possess the qualifications hereinafter mentioned "may be, insured in manner provided in this Act, "and all persons so insured (in this Act referred to "as 'insured persons') shall be entitled in the "manner provided by, and subject to the conditions "contained in, this Act to the benefits in respect of "health insurance and prevention of sickness con-"ferred by this Act."

Section 2 (1) of the Act then goes on to define "employed contributors" as: "The persons employed "within the meaning of this Act are all persons of "either sex, whether British subjects or not, who are "engaged in any of the employments specified in "Part I. of the First Schedule to this Act, not being "employments specified in Part II. of that Schedule."

Part I. of the First Schedule specifies the "employments within the meaning of the Act" as :—

"(*a*) Employment in the United Kingdom under "any contract of service or apprenticeship, written "or oral, whether expressed or implied, and whether "the employed person is paid by the employer or "some other person, and whether under one or more "employers, and whether paid by time or by the "piece or partly by time and partly by the piece, or "otherwise, or, except in the case of a contract of "apprenticeship, without any money payment."

The contention of the Ministry is that the "contract "of service" referred to must be for some legal purpose.

Prima facie, it would seem that McHugh having contributed for so many years to the fund out of which

the insurance benefits are payable fell within the definition, and such a conclusion would seem to be only fair and just. It is objected, however, that the employment of the deceased was illegal under the Betting Act, 1853 (16 & 17 Vic., c. 119), and that the duties imposed on him rendered him liable to the penalties mentioned in sections 3 and 4 of that Act.

Mr. Sheil in his very able argument, while contesting vigorously that the ordinary duties of the deceased deprived the applicant of the benefits of the Insurance Act, relied also on the fact that no question of illegality could affect the clerical work done by the deceased for 7/6 a week, this being entirely severable from the employment carried on in the offices of Mr. Townsend. However, a Statutory Order entitled the National Health Insurance (Subsidiary Employments) Order (Northern Ireland), 1938 (1938. No. 129), in its First Schedule, Part VII., excludes from employments within the meaning of the Act "employment in the "performance of clerical duties after 6-0 p.m. or "otherwise outside the ordinary hours of work." This makes the second contention of Mr. Sheil untenable, and the main question as regards the ordinary employment of McHugh has to be considered. Mr. Sheil contended that, though the employment might be tainted, it did not follow that the contract was illegal, and laid great stress on the decision of the Scottish case, *Fegan v. Department of Health for Scotland* (1).

The only Court pronouncement on the matter is in the case before the Scotch Court of Session, which Mr. Sheil relied on. Certainly the facts of that case were very similar, and it would require a good deal of legal or scholastic acumen to draw distinctions which are such a favourite resort of jurists when they wish to harmonize conflicting decisions, or those which seem to be conflicting. I confess that in the present case I should prefer to come to the same conclusion as the majority of the Scotch Lords in that case.

The facts in it were that a bookmaker who carried on both credit and cash betting business employed his

(1) 1935 S.C. 823.

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son to act as his clerk. Most of the son's duties related to the credit transactions, but in fact he carried through both credit and cash business, and contributions for insurance were duly paid as here.

The Scotch Court by a majority decided that the employment constituted the bookmaker's son an insured person.

Mr. Sheil adopted as his argument the judgment of Lord Normand, while the Attorney-General analysed and criticised that judgment, and strongly urged the dissenting judgment pronounced by Lord Fleming.

As I have indicated I am not disposed to draw subtle discriminations between the facts of the two cases, however tempting such a course might be; but I shall deal merely with the facts before me. I have considered the legal propositions set out in all the judgments, and I must say that in my opinion the law as stated by the majority and the minority does not differ. The point of difference is the inference drawn from the facts as to the substance of the "contract" of employment. The phrase "judicial innocence" has become proverbial, but I do not think that it tends to the administration of justice that it should extend to benevolent credulity, and go so far as to assume that no one intends to do an illegal act, notwithstanding appearances. If intention is not to be inferred from facts, if ordinary considerations that affect people in the conduct of business or every-day life are to be abandoned, if reasonable conclusions are not be drawn from the acts of parties, taking into account their position and surroundings, all our criminal law would be paralysed. Innocence, no doubt, is to be presumed, but that presumption like other presumptions in the administration of law may be rebutted by evidence of facts.

It was stated by Lord Normand that in determining whether an ordinary contract of service is a contract of service for the purpose of the Insurance Acts, an intention which is neither an express term of the contract, nor the basis of it, that some part of the servant's work may be unlawful shall not exempt him from paying contributions to the insurance fund.

I agree that the presumption should be against illegality, but it would be going to the limit of credulity to conclude in the present case that there was no necessary intention in the minds of both parties that cash betting should be carried on when the arrangement for McHugh's employment in Enniskillen was made. Part of the employment mentioned in the claim was McHugh's work in Omagh, which was for the most part cash betting. He was employed by the week, and it is impossible to suppose that when he was transferred to Enniskillen, to be the sole occupant of Townsend's office there, it was not the clear intention, and indeed part of his contract, that he should manage cash betting. Lord Normand envisaged the possibility of the cash side of the business being abandoned. I am afraid if that were submitted for the consideration of reasoning men the chance of such a thing happening would be regarded as infinitesimal. What would be the betting odds on its likelihood ?

In any case, I can come to no other conclusion than that it was part of the arrangement in regard to McHugh's employment that his duties would be to conduct cash betting business in a " place " devoted to that business, and that this was really an essential element in the contract.

As Lord Fleming did in Fegan's case (1), so in this case, on the facts, do I find it impossible to give any other meaning to this finding than that which I have stated, viz., that it was a term of the contract that the deceased, if required by his employer, should render services of a character prohibited by the Betting Act, 1853, which were, therefore, contrary to law.

The reasoning of Lord Fleming commends itself to me, and in my opinion it is entirely applicable so far as it states the law and inferences to be formed from the facts. The English cases quoted—*Kemp v. Lewis* (2) and *Pounteney v. Turton* (3)—establish clearly that if a contract under which a workman employed is illegal it is not a contract for service within the Workmen's Compensation Acts. I regret that I feel

(1) 1935 S.C. 823 at 834.
(2) [1914] 3 K.B. 543.
(3) 34 T.L.R. 103.

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compelled to come to the conclusion I have expressed.

The deceased contributed to an insurance fund and no objection was made to taking the contributions made by him or on his behalf. It is repugnant to ordinary sense that such a state of things should happen, but unless a difference is to be made between the law applicable to the Betting Acts and other matters prohibited by law there is no alternative open. I must, therefore, dismiss the appeal.

Solicitors for the applicant: *Shields & Murnaghan.*

Solicitor for the Ministry of Labour: *Chief Crown Solicitor.*

M.W.G.

CAIRNS v. CAIRNS.

K.B.D. (Matrimonial) 1940.

March 26. April 26.

Divorce—Desertion—Reasonable excuse—Persistence in intention to desert—Onus of proof—Duty to take steps to effect reconciliation—Matrimonial Causes Act (Northern Ireland) 1939 (2 & 3 Geo. 6, c. 13), sec. 2 (b).

In order to obtain a decree for divorce on the ground of desertion the petitioner must prove (1) that throughout the whole of the period of three years immediately preceding the presentation of the petition, the respondent deserted and persisted in the intention to desert the petitioner without reasonable excuse, and (2) that he or she was willing to resume cohabitation with the respondent and the normal relationships of marriage; but it is not necessary that there should have been on the petitioner's part any desire in the emotional sense to resume cohabitation.

There is no legal obligation on the deserted spouse to take any steps to induce the other spouse to resume cohabitation. The initiative lies with the spouse who is in desertion.

The facts appear in the judgment.

Copeland (for the petitioner):—

The petitioner had good ground for suspecting his wife of infidelity, and it was for her to give a satisfactory explanation of her conduct. Subject to such explanation being given, the petitioner was always willing to receive the respondent back and to resume cohabitation; he acted reasonably and properly. *Pratt v. Pratt* (1), *Sifton v. Sifton* (2).

There was no appearance for the respondent.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: The petitioner in this case seeks the usual decree nisi on the ground of his wife's desertion. The parties were married on 4th May, 1927, in Banbridge, where they then resided. After a few days' honeymoon together at Bangor they returned to Banbridge, proceeding to the homes of their respective parents. In 1929 they set up house together. After a short time they became somewhat

(1) [1939] A.C. 417. (2) [1939] P. 221.

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estranged from one another. According to the petitioner's evidence the respondent stayed out late at night, and ultimately the petitioner became justifiably suspicious of his wife's relations with a man named William Livingstone, who had returned on a visit from Canada. In April, 1930, the respondent left the petitioner's home and went to reside with her parents. Some months afterwards a reconciliation was effected and a new home was set up, but trouble soon developed again as a result of a letter addressed to the respondent which had been despatched from Canada. This was followed by a telegram obviously sent by Livingstone who had again arrived from Canada. Secret meetings took place between Livingstone and the respondent who left the petitioner's house on 18th June, 1931, and was next seen by him when, as a result of information which he received, he went to Belfast Quay on 27th June. There he found the respondent and Livingstone both carrying travelling cases; and, on being challenged by the petitioner, the respondent said that she "was running "away from the trouble and troublesome company." A scene resulted during which the petitioner struck Livingstone and knocked him down. It does not, however, appear that the petitioner used any violence towards his wife. The respondent failed to give the petitioner any information as to how or where she spent the ten days from 18th to 27th June. On the same day the respondent went to her parents' house in Banbridge and thenceforth resided there. The petitioner continued to reside in his house in Banbridge, but after a time, during which the respondent made no offer to return, he gave it up and went to live with his mother, and thenceforth resided with her in Banbridge. The petitioner and respondent have frequently seen one another since 27th June, 1931, but have never spoken to each other. Neither has made any suggestion to the other of again setting up house together. The petitioner's attitude towards her was not an unnatural one. "I would," he said, "have "taken her back if she had explained where she was "during those ten days—that is, if she had been able

"to give a satisfactory explanation of where she had "been—but not otherwise. I have felt since then "that as she sinned against me I was relieved from all "further obligation towards her."

On the evidence before me I am satisfied that the respondent in fact deserted her husband on 18th June, 1931, without reasonable excuse ; and the only question upon which I felt it necessary to consider my judgment was whether, having regard to recent authority in England and Scotland, the facts, including, in particular, the petitioner's attitude of mind in the matter, warranted a finding of legal desertion.

Perhaps I should first refer to the judgment of Buckley, L.J., in *Harriman v. Harriman* (1), at p. 148, in which a wife alleged desertion against her husband. The learned Lord Justice called attention to the words of Cockburn, L.J., in *Ward v. Ward* (2), that "the act "of desertion must be done against the will of the "wife." "If these words," he said, "were to be "understood as meaning that desertion cannot be "predicated of a husband when his wife is thankful "that he has left her (because, say, she always went "in bodily fear of him), then, with great respect, he "did not agree. Desertion," he continued, "did not "necessarily involve that the wife desired her husband "to remain with her. She may be thankful that he "has gone, but he may nevertheless have deserted "her."

Sifton v. Sifton (3), was the case of a husband's petition based on alleged desertion. After an agreement to separate for six months the petitioner and respondent never resumed cohabitation because at the end of the stipulated period and later, the wife, though invited by the husband, refused to return. The question with which Henn-Collins, J., was principally concerned was whether on the facts the parties were at all times after the expiration of the six months or so, more particularly for any part of the three years immediately preceding the presentation of the petition and onwards, living apart by mutual

(1) [1909] P. 123.
(2) 1 Sw. & Tr. 185.
(3) [1939] P. 221.

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consent. On the facts the learned Judge doubted whether the husband expected or really wanted her to come back. The wife, on the other hand, had no justification when the terms of the agreement ran out for remaining from the home. In these circumstances the learned judge called to his aid the words of Scrutton, L.J., in *Bowron v. Bowron* (1), at p. 195: "The intention (that is the intention to desert) is "presumed to continue, unless the husband (the "deserting party in that case) proves genuine re- "pentance and sincere and reasonable attempts to "get his wife back." After this reference Henn-Collins, J., continued:—"I was inclined at one time "to take the view that it was incumbent in the circum- "stances upon the husband to show that he was at all "times during the statutory period up to the service "of the petition ready and willing to receive his wife, "but I am satisfied by the authorities that this is not "so. When the spouse is deserted he or she is in the "position that the presumption is in his or her favour "and against the deserting spouse, and it is not until "some offer to return is made by the other side that "the question arises whether that is an offer which "ought in all the circumstances to be accepted. If "it were true to say that the deserting spouse must "at all times be ready and willing to receive back the "husband or wife as the case may be, *Herod v. Herod* (2) "could not have been decided as it was, because no "Court would hold when a man was living in adultery, "as in that case, that his wife should return."

This brings me to the decision of the House of Lords in *Pratt v. Pratt* (3). In that case the respondent deserted her husband in August, 1934. Two years later she wote to him twice asking him to see her with a view to discussing a resumption of cohabitation, but he refused to do so, saying that an interview would serve no useful purpose. It was held, affirming the decision of the Court of Appeal, that, after this refusal by the husband, the respondent could not be said to continue to desert him "without cause" within the

(1) [1925] P. 187.
(2) [1939] P. 11.
(3) [1939] A.C. 417.

meaning of section 2 of the Matrimonial Causes Act, 1937. After referring to the fact that the unopposed character of the petition in no way absolved the petitioner from the obligation of discharging the burden of proof imposed on him, Lord Macmillan said that in his opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent had without cause been in desertion, that is, that the deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. The learned Law Lord continued :— "In fulfilling its duty of determining whether on the "evidence a case of desertion without cause has been "proved the Court ought not in my opinion to leave "out of account the attitude of mind of the petitioner. "If on the facts it appears that a petitioning husband "has made it plain to his deserting wife that he will "not receive her back, or if he has repelled all the "advances which she may have made towards a "resumption of married life, he cannot complain "that she has persisted without cause in her desertion." After referring to the Scotch law on the subject of desertion, Lord Macmillan cited with approval a passage from the judgment of Lord Justice Clerk (Aitchison) in *Macaskill v. Macaskill* (1), to the effect that desertion must be a separation against the will of the spouse seeking the remedy. The judge must be satisfied that the aggrieved spouse has been willing to fulfil the duties of the marriage throughout the whole statutory period, so that if the offending spouse had returned he or she would have been willing to resume the normal relationships of marriage. But when it is said, as it frequently has been said in these cases, that the pursuer must desire the return of the offender, it is not to be taken in too literal a sense as signifying the requirement of a subjective state of mind, a desire in the emotional sense. It is obvious that in a great many cases of desertion the conduct of the deserting spouse must have been of a kind to destroy affection, and that it would be a mockery for the innocent

(1) [1939] S.C. at p. 193.

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spouse to pretend that there was or had been a desire for the resumption of the married life. It is enough that a pursuer should be able honestly to say that he or she was all along willing to fulfil the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent.

In my opinion the position as to what the law requires of a petitioning spouse who alleges desertion is further usefully expounded by the speech of Lord Romer. At page 426, in referring to the two letters written by the respondent expressing the wish that she and her husband should come together again, Lord Romer said that if these letters had never been written the appellant (i.e., the petitioner) would have been entitled to the decree that he sought. "For," he said, "he himself would have been under no legal obligation "to take any steps to induce the respondent to return." The same view is expressed in other words by the learned Law Lord at page 428 where he accepts the argument that it was necessary in order to put an end to her desertion for the respondent to take some active step towards returning to the matrimonial domicile. This, however, he considered the respondent had done by the two letters; and in view of the petitioners' refusal to allow a meeting to take place her continued absence thereafter could not without an utter misuse of language be called a desertion.

Joseph v. Joseph (1) was an undefended suit by a wife for a decree for restitution of conjugal rights in which the petitioner had in the first place left her husband without just cause. Subsequently she wrote to her husband offering to go back to him, but he rejected the offer. Langton, J., applying the principle of *Pratt v. Pratt* (2) held that in such a matter a spouse who had been initially in the wrong could put himself or herself in the right by taking the proper steps to rectify it. Being of opinion that the wife had remedied the wrong done to her husband and that she was no longer in desertion, he granted a decree for restitution of conjugal rights.

(1) [1939] W.N. 288. (2) 1939 A.C. 417.

From the cases to which I have referred the following propositions appear to be established :—

(1) The burden of proof is upon the petitioner who alleges desertion to establish that throughout the whole course of the three years the respondent has without cause (or in the words of the Northern Ireland Act " without reasonable excuse ") been in desertion, i.e., that the respondent must have persisted in the intention to desert.

(2) The petitioner's attitude of mind is also material. The petitioner must have been willing, i.e., prepared, to take the respondent back, and to resume the normal relationships of marriage, although he, or she, need not have had any emotional desire to do so.

(3) There is no legal obligation on a deserted spouse to take any steps to induce the other spouse to return. This is a matter upon which the initiative lies with the spouse who is in desertion.

Now it seems to me that this third proposition necessarily places in a measure a limitation upon the second which is relevant to the facts of the present case, namely, that in general the question of willingness or preparedness on the part of the injured spouse to take the other back only properly arises for the consideration of the Court if and when that other who is in desertion has prior to suit, expressed, or in some manner manifested, a wish or desire for reconciliation. It is for the one who has acted wrongfully to give evidence of a change of heart or of mental attitude on his or her own part before he or she can search the heart or mind of the other party. On the facts of this case, had it been defended, it would obviously have been contrary to both common sense and justice if the respondent, who had wilfully deserted the petitioner against his wish and had since remained silent, could have successfully defended these proceedings on the ground that the petitioner was unwilling to take her back to his home unless and until she had satisfactorily explained conduct which seemed only consistent with the commission of adultery. My opinion on this matter is,

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I consider, fully warranted by *Bowron v. Bowron* (1), and *Sifton v. Sifton* (2), to which I have already referred.

Before concluding this judgment I would wish to say that I have considered recent high authority in Scotland on the subject of desertion. In *Macaskill v. Macaskill* (3), to which, as I have already mentioned, Lord Macmillan referred in *Pratt v. Pratt* (4), it was established that willingness on the part of the pursuer "to adhere" during the three year period remains an essential pre-condition of desertion without which such matrimonial offence could not exist; and in *Bell v. Bell* (as yet unreported but of the judgments in which I have been favoured with advance proofs) the whole Court of thirteen judges by a majority of seven to six decided that this willingness to adhere must persist beyond the triennium down to the commencement of the action. These decisions, which deal respectively with the quality of the separation and the duration of the desertion, became necessary both on account of the different wording of the Divorce (Scotland) Act, 1938, and also because of the history of the law of Scotland on the subject of desertion which dates back to the Act of 1573. In the circumstances no useful purpose would be served by making more specific reference to these decisions.

On the whole case I am of opinion that the respondent had been in desertion without reasonable excuse for upwards of eight years immediately preceding the presentation of the petition, and that the petitioner is entitled to the relief which he seeks. I, accordingly, make the usual order for a decree nisi.

Solicitors for the petitioner: *N. & F. Tughan.*

J. McC.

(1) [1925] P. 187.
(2) [1939] P. 221.
(3) [1939] S.C. 187.
(4) [1939] A.C. 417.

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DIVORCE—DESERTION—REASONABLE EXCUSE—*Persistence in intention to desert—Onus of proof—Duty to take steps to effect reconciliation—Matrimonial Causes Act* (*Northern Ireland*), 1939 (2 & 3 *Geo.* 6, *c*, 13), *sec.* 2 (*b*). In order to obtain a decree for divorce on the ground of desertion the petitioner must prove (1) that throughout the whole of the period of three years immediately preceding the presentation of the petition the respondent deserted and persisted in the intention to desert, the petitioner without reasonable excuse, and (2) that he or she was willing to resume cohabitation with the respondent and the normal relationships of marriage; but it is not necessary that there should have been on the petitioner's

part any desire in the emotional sense to resume cohabitation. There is no legal obligation on the deserted spouse to take any steps to induce the other spouse to resume cohabitation. The initiative lies with the spouse who is in desertion. *Cairns v. Cairns.* [K.B.D. (Matrimonial) 183

DIVORCE—DESERTION WITHOUT PREVIOUS COHABITATION. There may be desertion without previous cohabitation. Husband and wife separated immediately after their marriage and never cohabited. The wife's parents were willing that the spouses should live together in the wife's parents' house where there was sufficient accommodation for them; the wife was anxious that they should do so, and asked the husband to live with her there, but he never agreed to do so, and never did so. *Held*, that the husband was guilty of desertion. *Wells v. Wells.* [K.B.D. (Matrimonial) 88

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LUNACY—COMPULSORY ACQUISITION OF LUNATIC'S REAL PROPERTY—*Compensation money—Conversion—Lunacy Regulation (Ireland) Act*, 1871 (34 & 35 *Vict., c.* 22), *sections* 63 *and* 67—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict., c.* 18), *section* 69. The owner of a fee farm rent who had made a will by which she devised it to the plaintiff became a person of unsound mind and incapable of managing her affairs and was so found by the Lord Chancellor of Ireland. Under the Belfast Corporation Act (Northern Ireland), 1924, the rent was compulsorily acquired by the Belfast Corporation, and pursuant to an order of the Lord Chief Justice, directing that the committee should be at liberty in the name of the person of unsound mind to execute a conveyance of the rent to the Corporation, the rent was conveyed to the Corporation, and the amount awarded for compensation was lodged in Court to the credit of the Lunacy Matter. The testatrix afterwards died. *Held*, by the Court of Appeal:—(1) That this was not a "sale" under the Lunacy Regulation (Ireland) Act, 1871; and (2) (reversing the order of Megaw, J.), that section 69 of the Land Clauses Consolidation Act, 1845, applied; that under it there had been a constructive re-conversion of the money awarded for compensation, and that the plaintiff was entitled to it. *Re Stuart, decd., Corrigan v. Dempsey* .. C.A. 30

MERCHANDISE MARKS—SALE OF GOODS IMPORTED FROM EIRE—*Indication of origin—Whether term "Irish" sufficient indication of origin—Merchandise Marks Act*, 1926 (16 & 17 *Geo.* 5, *c.* 53), *section* 1 (1), 10 (1). The defendant, who carried on business as a dairyman and packer of butter at Cregagh Dairy, Loopland Drive, Belfast, sold butter which had been produced in Eire, and which was wrapped in a parchment wrapper bearing the words, "Irish Creamery "Butter Freshly Packed by Cregagh "Dairy, Loopland Drive, Belfast," and was contained in a cardboard carton bearing on one side the words, "Pure Irish Creamery Butter Freshly "Packed," on a second side the words, "Pure Irish Creamery Butter, Cregagh "Dairy, Loopland Drive, Belfast." and on a third side a picture of a dairy farm with cattle grazing thereon, and the words "Cregagh" and "Dairy." *Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.), that the term "Irish" was not a sufficient indication of origin under the Merchandise Marks Act, 1926, section 1, sub-section 1 and section 10 sub-section (1). *Geelan v. Smith* K.B.D 17

NATIONAL HEALTH INSURANCE —NATIONAL HEALTH INSURANCE ACT, 1936 (26 GEO. 5 & 1 EDW. 8, C. 32), SECTION 161—*Widows' pension—Bookmaker's clerk employed in both legal and illegal betting business—Whether an "insured person"—National Health Insurance Act*, 1936, *sections* 1 *and* 2, *and First Schedule, Part I.* (*a*)—*Widows', Orphans' and Old Age Contributory Pensions Act* (*Northern Ireland*), 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 32), *section* 2. By sec. 3 (1) of the Widows', Orphans' and Old Age Pensions Act (Northern Ireland), 1936, the widow of a man who was insured at his death under the National Health Insurance Act, 1936, is entitled to receive a widow's pension. Sec. 1 of the National Health Insurance Act, 1936, provides that all persons who are "employed within the meaning of "the Act" shall be insured. The persons employed within the meaning of the Act are (sec. 2 (1)), "persons "engaged in any of the employments "specified in Part I. of the First "Schedule of the Act," which defines "employments within the meaning of "the Act" as including "Employment "under any contract of service." The deceased husband of the appellant had been employed for six and a half years immediately prior to his death as a clerk in a bookmaker's office. The business included both cash and credit betting. The deceased also did some overtime clerical work for his employer at his own residence, for which he was paid 7/6 weekly. He was insured under the National Health Insurance Acts at the date of his death. The claim by the appellant for a widow's pension under the Widows', Orphans' and Old Age Contributory Pensions (Northern Ireland) Act, 1936, was dismissed by the Ministry of Labour for Northern Ireland. On appeal to the High Court under the National Health Insurance Act, 1936, section 161. *Held*, by Megaw, J., that the basis of the contract of employment was that the duties of the deceased should involve the conduct of cash betting business in a "place"

devoted to that business, contrary to the Betting Act, 1853, secs. 3 and 4, that the deceased man's employment was not employment under any contract "of service" within the meaning of the National Health Insurance Act, 1936, and that the appellant was not entitled to such pension. *McHugh, Appellant; Ministry of Labour for Northern Ireland, Respondent.* .. [CH.D. 174

NEGLIGENCE—CAUSE OF ACTION—*Fishing boat—Crew co-adventurers—Remuneration by share of profits—Damage to boat—Loss of profits—Remoteness of damage.* The plaintiff was one of the crew of a fishing boat. He was remunerated wholly by a share in the profits or gross earnings of the boat. The boat was damaged in a collision with the defendant's schooner, due to the negligence of the defendant, and the plaintiff lost his share of the profits which would normally have been made during the time the boat was under repair. The plaintiff sued the defendant in the County Court for damages for negligence. The County Court Judge dismissed the case. On appeal to the Judge of Assize it was—*Held*, by Murphy, L.J., that the damage sustained by the plaintiff by reason of the loss of his share of the profits of the boat was not too remote, and that he was entitled to damages. *Hanna v. McKibben* .. [C.A. 120

OBSTRUCTION OF PUBLIC STREET—*Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 *Vict.*, *c.* 92), *section* 13 (3)—*Street Trading (Regulation) Act (Northern Ireland)*, 1929 (20 *Geo.* 5, *c.* 9)—*Licence to trade on highway "subject to any statutory "provision which is in force"—Construction of statute.* A person trading in the public street in exercise of a right so to do given by a licence granted to him by the local authority under the Street Trading (Regulation) Act, 1929 (20 Geo. 5, c. 9), is not guilty under the Summary Jurisdiction (Ireland) Act, 1851, section 13 (3) of wilful prevention or interruption of the free passage of any person or carriage on the street. *The King (Small) v. Black* .. .. .. C.A. 70

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ROAD AND RAILWAY TRANSPORT ACT (NORTHERN IRELAND), 1935 (25 & 26 GEO. 5, C. 15)—ACQUISITION BY NORTHERN IRELAND ROAD TRANSPORT BOARD OF EVERY ROAD MOTOR UNDERTAKING OPERATED FOR HIRE OR REWARD, WHICH HAD BEEN COMMENCED BEFORE 1ST JUNE, 1934, PAYING COMPENSATION—*Prohibition of use of motor vehicles on public highway for hire or reward except with consent of Board—Motor transport undertaking commenced after 1st June*, 1934—*Goodwill lost by reason of prohibition—Property taken without compensation—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *sec.* 5, *sub-sec.* 1—*Validity of Prohibition—Right of Attorney-General to intervene.* By the Road and Railway Transport Act (Northern Ireland), 1935, sec. 5, sub-sec. 1, it was enacted that the Northern Ireland Road Transport Board should acquire every road motor undertaking operated for hire or reward in Northern Ireland immediately before the passing of the Act and then providing a transport service which had been commenced before 1st June, 1934, paying compensation therefor, and by sec. 15, sub-sec. 1 of the Act it was enacted that a person other than the Board should not use a motor vehicle on any public highway for the conveyance of passengers or the carriage of merchandise for hire or reward except with the consent of the Board. On 11th June, 1934, the defendant had commenced to operate a road motor undertaking for the carriage of merchandise for hire, and he had a substantial business with a valuable goodwill. The Board consented to the use of motor vehicles on the highway by the defendant for this undertaking, but that consent was subsequently revoked. The defendant having continued to use motor vehicles on the highway for hire or reward after the revocation of the consent, the Board brought proceedings against him at Petty Sessions for breach of sec. 15, sub-sec. 1 of the Act. The

Resident Magistrate dismissed the case on the ground that, as sec. 15, sub-sec. 1, enacted that goodwill should be taken from the owners without compensation, it was *ultra vires* the Parliament of Northern Ireland. On appeal to Quarter Sessions the Deputy Recorder of Belfast stated a case for the opinion of the Supreme Court. After hearing counsel for the parties, the Court invited the Attorney-General to argue certain questions which had arisen in the course of the proceedings. *Held* by Andrews, C.J., and Murphy, L.J. (Babington, L.J., dissenting), that sec. 15, sub-sec. 1, of the Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 15), did not enact that goodwill should be " taken " within the meaning of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 15), sec. 5, sub-sec. 1, and is not *ultra vires* the Parliament of Northern Ireland. *Held*, by the Court that the Attorney-General was entitled to intervene and appear at the hearing. *Northern Ireland Road Transport Board v. Benson.* .. [C.A. 133

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SUMMARY JURISDICTION AND CRIMINAL JUSTICE ACT (NORTHERN IRELAND), 1935 (25 & 26 GEO. 5, C. 13), SECTION 24 (1)—" CASES OF A CIVIL NATURE "—*Breach of Statutory Regulations as to turbary—Cutting turf so as to prevent future reclamation of bog—Neglect to provide drainage of water from bog—Appeal to Quarter Sessions.* A. was authorized by Regulations made under the Irish Land Act, 1903 (3 Edw. 7, c. 37), section 21, to cut turf in a certain bog on the lands of F.; by those Regulations he was prohibited from cutting the turf in such manner as to prevent the future reclamation of the bog, and was required to provide reasonable drainage for water to the natural outlet from the bog. The Regulations provided for the punishment of any breach of them by a fine not exceeding

£5. F. brought proceedings at Petty Sessions against A. in two cases, in one of which the complaint was that A. in exercise of the above right of turbary cut the turf in such a manner as to prevent the future reclamation of the bog, and in the other of which the complaint was that he neglected to provide reasonable drainage for water to the natural outlet from the bog. Both cases were dismissed. In both cases the complainant, F., appealed, under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, section 24, to the Court of Quarter Sessions. The County Court Judge convicted the defendant in both cases and fined him one shilling in each of them. The defendant obtained a conditional order for a writ of certiorari in each of the cases on the ground that it was not a case of a civil nature, and that no appeal lay to the Court of Quarter Sessions. On motions to make absolute the conditional orders. *Held* by the King's Bench Division (Andrews, L.C.J., and Brown, J.) that both the cases were cases of a civil nature. *The King* (*Keenan*) *v. County Court Judge for Tyrone* .. [K.B.D. 108

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VALUATION ACTS—EXEMPTION—HEREDITAMENTS USED EXCLUSIVELY FOR CHARITABLE PURPOSES—*House owned by County Infirmary Committee and in actual occupation of their part-time surgeon—Valuation* (*Ireland*) *Amendment Act*, 1854 (17 *Vict.*, *c.* 8), *section* 2—*Valuation* (*Ireland*) *Act*, 1852 (15 *&* 16 *Vict.*, *c.* 63), *section* 16—"*Private Profit or use.*" In 1937 the A. County Infirmary Committee built a house as a residence for their part-time surgeon. This house included an out-office and garden. It was owned by the County Infirmary Committee but was in the actual occupation of their part-time surgeon. It was built within the curtilage of the Infirmary and was connected with the main infirmary buildings for patients by an enclosed communicating passage. The County Court Judge of A. held that this house should be distinguished by the commissioner as exempt from poor rates and county rates as being "used "for charitable purposes." He, accordingly, allowed the appeal from the Commissioner of Valuation but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.), that the County Court Judge was right in holding that the house occupied as a residence by the part-time surgeon should be distinguished as exempt as being "used for charitable purposes." *Armagh County Infirmary Committee v. Commissioner of Valuation for Northern Ireland* .. .. [K.B.D. 1

WIDOWS', ORPHANS' AND OLD AGE CONTRIBUTORY PENSIONS ACT (NORTHERN IRELAND), 1936 (26 GEO. 5 AND 1 EDW. 8, CAP. 32), SEC. 13 (1)—*Widows' Pension—Failure of employer to pay contributions—Widow not entitled to pension—Right of widow to recover from employer—Summary Jurisdiction and Criminal Justice Act* (*Northern Ireland*), 1935 (25 *&* 26 *Geo.* 5, *cap.* 13), *sec.* 21 (1)—"*Cases for the recovery of debts between party and party.*" An employer who has failed or neglected to pay contributions payable by him under the Widows', Orphans' and Old Age Contributory Pensions Act (Northern Ireland), 1936, in respect of an "insured man," by reason of which failure or neglect the man's widow is not entitled to a widow's pension under the Act, is liable to pay to the widow the sums to which she would have been entitled under the Act in respect of such pension if the contributions had been duly paid. The words "between party and "party" in section 21, sub-section (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, refer to the form of the proceedings, not to the nature of the debt sued for. *Coyle v. Devlin* [C.A. 79

WILL—CHARITY—*Gift to "the "Theosophical Society of Belfast"—No such Society—Objects of Theosophical Society—Whether gift for public benefit—Question for Court—Validity—Gift to the several members of Belfast Lodges of Theosophical Society in Ireland.* By her will a testatrix directed her estate, which consisted of realty and personalty, to be realised and converted into money and out of the proceeds she bequeathed, among other legacies, to "the Theosophical Society "of Belfast five hundred pounds." The residue was bequeathed to certain

of the pecuniary legatees, including "the Theosophical Society of Belfast," in proportion to the amounts of their pecuniary legacies. There existed in Belfast three Lodges of the Theosophical Society in Ireland, which is constituted under the Rules of the Theosophical Society, a world-wide organisation, incorporated and having its headquarters in Madras. The objects of the Society as set out in the Memorandum of Association are:—(1) to form a nucleus of the Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour; (2) to encourage the study of Comparative Religion, Philosophy and Science; (3) to investigate the unexplained laws of Nature; (4) the purchase, acquisition, holding, management, etc., of funds and property used for the above objects. There was no body properly described as "the "Theosophical Society of Belfast." Though the Belfast Lodges were distinct, they met together as one body, elected office-bearers in common, had one established meeting-place, the same minute books, one set of rules and one banking account. The records were such that the precise membership of the Lodges at the date of the death of the testatrix could be ascertained. The testatrix died within three months after the execution of the will. *Held*—(1) That the question whether a gift is for the public benefit is a question to be answered by the Court. (2) That the objects of the Theosophical Society are not exclusively charitable. (3) That the legacies were valid gifts to the several persons comprising the Lodges in Belfast of the Theosophical Society in Ireland at the date of the death of the testatrix. *Re Lester, McCracken v. Law* .. .. .. [CH.D. 92

WILL DESTROYED BUT NOT REVOKED—*Proof of due execution of will—Admissibility of letter written after execution of will to prove contents of will.* A testatrix made a will which was prepared for her by an experienced solicitor and which was afterwards destroyed but was not revoked. Another solicitor, who had succeeded to the practice of the former solicitor, proved that the will bore the signature of the testatrix, and two other signatures purporting to be those of persons who signed as witnesses of the execution of the will by her. This was the only evidence of the execution of the will. On the day on which the testatrix made the will she wrote to A. a letter stating that she had done so, and had left her everything she possessed. This letter was the only evidence of the contents of the will. *Held*—(1) The evidence was sufficient to justify a finding of due execution of the will. (2) The letter written by the testatrix was admissible in evidence to prove the contents of the will as part of the *res gestae*. *In the goods of Anna Gilliland, (deceased)* .. [K.B.D. (Probate) 125

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